Hastings International and Comparative Law Review

Volume 12
Number 1 *Fall 1988*

Article 1

1-1-1988

Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos

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By DAVID COLE,*
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I. INTRODUCTION

Trajano, et al., Petitioners-Appellants v. Marcos, et al., Defendants-Appellees is a consolidated appeal of five separate civil suits in the United States Court of Appeals for the Ninth Circuit.[1] Its resolution may well affect the future of international human rights litigation in domestic courts, in part because the Justice Department has chosen to use the case to urge an extremely restrictive interpretation of the Alien Tort Statute, an important jurisdictional basis for human rights suits in federal courts.

Plaintiffs in the consolidated appeals, all aliens, claim that they or their relatives were arbitrarily detained, unlawfully imprisoned, tortured, and/or summarily executed by defendants or persons acting pursuant to defendant's authority. The defendants, also all aliens, include the deposed President of the Philippines, Ferdinand E. Marcos; General Fabian Ver, a cousin of Mr. Marcos and former Chief of Staff of the Philippine Armed Forces; and Imee Marcos-Manotoc, President Marcos' daughter and National Chairman of the Kabataag Baranggay.[2] Plaintiffs assert that defendant's actions violate customary international human rights law, as well as United States and Philippine law. They seek both punitive and compensatory damages.

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1. *Trajano* Compl. ¶¶ 5-7, ER A2-A3; *Sison* Compl.¶¶ 6-7, ER A3; *Hilao* Compl. ¶¶ 10-11, ER A5; *Clemente* Compl. ¶ 3, ER 16.

2. *Id.*

Plaintiffs predicate jurisdiction upon the Alien Tort Statute.[3] That statute grants the federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[4] Defendants were served with process in the United States. The district court dismissed the cases on act of state grounds.[5]

A. Issues Presented

After oral argument, the panel in *Trajano v. Marcos* requested the Justice Department to address three issues as *amicus curiae*. These issues were:

1. Does the Alien Tort Statute provide a cause of action for wrongful death, wrongful arrest or torture committed by a foreign governmental official against a foreign national in a foreign nation?
2. Does the act of state doctrine remove wrongful death, wrongful arrest or torture from the federal courts' jurisdiction or is the doctrine inapplicable as a matter of law because those actions can never be "acts of state" or because the "balance of relevant considerations" favors a hearing?
3. Is the possibility of potential embarrassment to the United States sufficient reason for the federal courts to abstain from hearing these cases?

In response to these questions, the Justice Department submitted a forty page brief devoted principally to arguing that the Alien Tort Statute should not apply to all torts committed in violation of international law between aliens outside the territory of the United States, but only to those violations that contravene international laws that create rights that are recognized under United States law. This introduction briefly outlines the Justice Department's main arguments. The remainder of the Article reproduces the *amicus curiae* memorandum submitted on behalf of nineteen international law scholars and practitioners in response to the Justice Department's brief.[6] Eight years earlier, three of those scholars and practitioners had signed the *amicus curiae* memorandum for the

3. 28 U.S.C. § 1350 (1988).

4. *Id.*

5. Trajano v Marcos, No. 86-207, slip. op. (D. Haw. July 18, 1986), *appeal docketed*, No. 86-2448 (9th Cir. Aug. 20, 1986).

6. This brief was drafted by David Cole, Center for Constitutional Rights, Professor Jules Lobel, University of Pittsburgh Law School, and Professor Harold Hongju Koh, Yale Law School. It was submitted on behalf of Professors Anthony D'Amato, Lori F. Damrosch, Drew S. Days, III, Richard Falk, Michael Glennon, Claudio Grossman, Joan Hartman, Harold Koh, Mr. William T. Lake, Professors Cynthia Lichtenstein, Richard Lillich, Jules Lobel,

United States submitted to the United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*.[7] The Second Circuit's opinion in *Filartiga* cited extensively to the Department's memorandum. Their *amicus* brief now submitted by the scholars and practitioners in *Trajano* maintained that the Justice Department's position in *Trajano* constituted a reversal of its position in *Filartiga*, and was contrary to an established body of judicial precedent as well as basic principles of international law.

B. Justice Department's *Amicus* Brief

The Justice Department devoted virtually its entire brief to the Ninth Circuit's first question, concerning the scope of the Alien Tort Statute. The Justice Department argued that United States district courts do not have jurisdiction under 28 U.S.C. § 1350 over a suit between aliens for torts that were committed in another country, except in extremely circumscribed situations.[8] It maintained that the Alien Tort Statute confers jurisdiction on the courts of the United States only if there is some nexus between the international law ("Laws of Nations") allegedly violated and the United States responsibility under domestic law. In its view, Alien Tort Statute jurisdiction should be limited to those situations where the tortfeasor was subject to United States jurisdiction when the tort was committed, the United States would be accountable for the action, Congress has passed a criminal statute defining the conduct as an offense against the law of nations, *and* that federal statute provides a private right of action.

The Justice Department further argued that neither treaties, the United Nations Charter, the Alien Tort Statute, nor customary international law grant plaintiffs in *Trajano* a private right of action. It claimed that only Congress or a court acting pursuant to express legislative authority can confer a private right of action, and that 28 U.S.C. § 1350 should not be construed as such authority, but as solely jurisdictional.[9]

Myres S. McDougal, Frank Newman, Stefan A. Riesenfeld, Oscar Schachter, Henry Steiner, David Weissbrodt, and Burns Weston.

7. Filartiga v. Pena-Irala 630 F.2d 876 (2nd Cir. 1980), see infra appendix.

8. *See* Memorandum for the U.S. as Amicus Curiae submitted in *Trajano* (No. 86-2448).

9. The Justice Department answered the Ninth Circuit's second question by claiming that the court should not now decide the applicability of the "act of state doctrine" because the cases at issue are not cognizable under 28 U.S.C. § 1350.

The Department answered the Ninth Circuit's third question in two short paragraphs, stating that the case would not embarrass the relations between the United States and the Philippines. As support for its argument, it noted that the government of the Philippines has submitted an *amicus curiae* brief in *favor* of deciding the case on its merits.

II. *AMICUS CURIAE* MEMORANDUM ON BEHALF OF INTERNATIONAL LAW SCHOLARS AND PRACTITIONERS IN SUPPORT OF PLAINTIFFS IN *TRAJANO V. MARCOS*

QUESTION PRESENTED

Whether the Alien Tort Statute[10] confers federal jurisdiction and a cause of action in a suit in which aliens allege that a former foreign governmental official, who now resides and has been served with process in the United States, committed torts against them abroad in violation of customary international human rights law.

INTEREST OF AMICI

Amici, the lawyer and law professors named below, submit this memorandum in response to arguments regarding the Alien Tort Statute advanced in the Justice Department's *amicus curiae* brief filed on October 29, 1987 ("J.D. Br."). In that brief, the Justice Department reversed the position regarding the Alien Tort Statute previously taken by the United States in *Filartiga v. Pena-Irala*.[11] In *Filartiga*, the Second Circuit adopted the United States' assertion that an alien may enforce in a federal court the right under customary international law to be free from torture, and that the Alien Tort Statute therefore conferred jurisdiction upon the district court to adjudicate an alien's claim that a Paraguayan governmental official, who was present and had been served with process in the United States, had committed torture in Paraguay in violation of the law of nations.

Amici believe that *Filartiga* is a sound and correct statement of the law, and that the cases consolidated in this appeal are on all fours with *Filartiga*. Amici therefore urge this Court to reject the Justice Department's novel and unprecedented interpretation of the Alien Tort Statute, which would bring this Court into direct conflict with the Second Circuit.

Amici include law professors who have published widely in the areas of international human rights, the relationship between United States

10. 28 U.S.C. § 1350 (1988).

11. 630 F.2d 876 (2d Cir. 1980); *See* Memorandum for the United States as Amicus Curiae submitted in *Filartiga, reprinted in* 19 I.L.M. 585, 604 (1980) [hereinafter "Government *Filartiga* Memorandum"] (attached to this Memorandum as Appendix A *reprinted infra* p. 34.).

law and international law, and the enforceability of international law in domestic courts.[12] Some have served as legal counselors to the State Department; others have served in the Justice Department. One amicus, William T. Lake, is a practicing attorney who formerly served as Principal Deputy Legal Adviser to the Department of State. Briefly, amici's affiliations and qualifications are as follows:

Professor Anthony D'Amato is a Professor of International Law at Northwestern University Law School, who has written widely on the Alien Tort Statute and international law. He is co-author, with Richard Falk and Burns Weston, of *International Law and World Order* (1980). He has been a member of the Executive Council of the American Society of International Law, and is a member of the Board of Editors of the American Journal of International Law.

Professor Lori F. Damrosch is an Associate Professor at Columbia Law School, where she teaches and writes in the area of public international law and foreign relations law. During the Carter Administration, she served as Special Assistant to the Legal Adviser of the State Department.

Professor Drew S. Days, III is a Professor of Law at the Yale Law School, where he teaches and writes in the areas of federal jurisdiction, civil procedure, and constitutional law. As Assistant Attorney General for the Civil Rights Division of the Department of Justice in the Carter Administration, he was on the United States' *amicus curiae* memorandum in *Filartiga v. Pena-Irala*. He also served as a member of the United States delegation to the Madrid meeting on the Helsinki Accords in 1980.

Professor Richard Falk is the Albert G. Milbank Professor of International Law and Practice at Princeton University. He has served as a Vice-President of the American Society of International Law, and has written several books on international law, including *The Role of Domestic Courts in the International Legal Order* (1964).

Professor Michael Glennon is a Professor of International Law at the University of California at Davis. He has written widely in interna-

12. On questions of customary international law, the courts have long looked to "the works of jurists and commentators, who by years of labor, research, and experience have made themselves peculiarly well aquainted with the subject of which they treat." The Paquete Habana, 175 U.S. 677, 700 (1900). *See also* United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *Filartiga*, 630 F.2d at 880-81. Article 38.1(d) of the Statute of the Court of International Justice, 59 Stat. 1055, T.S. 993, 3 Bevans 1179, expressly declares that "the teachings of the most highly qualified publicists of the various nations . . . [are] subsidiary means for the determination of rules of [international] law."

tional and foreign relations law, including most recently, *Foreign Relations and National Security Law* (1987) (co-author). He was counsel to the Senate Foreign Relations Committee from 1977-80.

Professor Claudio Grossman is a Professor of International Law at the Washington College of Law at American University, where he is the Director of International Legal Studies. He has been a consultant to the Inter-American Commission on Human Rights.

Professor Joan Hartman is a Professor of International Law at the University of Washington Law School in Seattle, Washington.

Professor Harold Koh is an Associate Professor of Law at the Yale Law School. He has written on the Alien Tort Statute and, as an attorney at the Office of Legal Counsel at the Justice Department, was on the Justice Department's *amicus curiae* brief to the Supreme Court in *Tel-Oren v. Libyan Arab Republic.*[13]

Mr. William T. Lake is a partner at the Washington law firm of Wilmer, Cutler and Pickering. From 1980-81, he served as Principal Deputy Legal Adviser of the Department of State. In that capacity, he was on the United States' *amicus curiae* memorandum in *Filartiga v. Pena-Irala.*

Professor Cynthia Lichtenstein is a Professor of International Law at Boston College Law School, and a Vice-President of the American Society of International Law.

Professor Richard Lillich is the Howard W. Smith Professor of Law at the University of Virginia. He is co-author, with Frank Newman, of *International Human Rights: Problems of Law and Policy* (1979).

Professor Jules Lobel is an Associate Professor at the University of Pittsburgh School of Law. He has written extensively on the application of international law as part of United States law.

Professor Myres S. McDougal is Sterling Professor of Law Emeritus at the Yale Law School. He has served as President of the American Society of International Law, and has written numerous books on international law, including *International Law in Contemporary Perspective: The Public Order of the World Community* (1981) (co-author).

Professor Frank Newman is the Ralston Professor of International Law at the University of California at Berkeley. He is a retired Justice of the California Supreme Court, and he is co-author, with Richard Lillich, of *International Human Rights: Problems of Law and Policy* (1979).

Professor Stefan A. Riesenfeld is the Emmanuel S. Heller Professor

13. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), *reprinted in* 24 I.L.M. 427 (1985).

of Law Emeritus at the University of California at Berkeley. He was former Counselor on International Law to the State Department, and was on the United States' *amicus curiae* memorandum in *Filartiga v. Pena-Irala*. He is an Honorary Vice-President of the American Society of International Law.

Professor Oscar Schachter is Hamilton Fish Professor Emeritus of International Law and Diplomacy at Columbia University. He was formerly an attorney for the State Department, Director of the General Legal Division of the United Nations, President of the American Society of International Law, and Co-Editor-in-Chief of the American Journal of International Law. He is co-author of *International Law: Cases and Materials* (1986), and is an advisor to the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States.*

Professor Henry A. Steiner is a Professor of Law and director of the Human Rights Program at the Harvard Law School. He has published articles on international law and human rights and is co-author of a course book on both topics, with Detlev Vagts, *Transnational Legal Problems* (1986).

Professor David Weissbrodt is a Professor of International Law at the University of Minnesota Law School. He has written over 50 articles, many of which relate to international human rights.

Professor Burns H. Weston is the Bessie Dutton Murray Distinguished Professor of Law at the University of Iowa. He is a member of the Editorial Boards of the American Journal of International Law and the Human Rights Quarterly, and has published more than 50 books and articles on international law, human rights, and foreign relations, including *International Law and World Order* (1980) (co-author).

INTRODUCTION

The Alien Tort Statute[14] grants the federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." In *Filartiga v. Pena-Irala*,[15] aliens invoked that statute to sue an alien governmental official in a U.S. district court for torture that he had committed overseas. The United States Court of Appeals for the Second Circuit found jurisdiction under the Alien Tort Statute, after determining that an international consensus existed that torture violated customary international human rights, thus constituting a "tort . . . committed in violation

14. 28 U.S.C. § 1350 (1988).
15. 630 F.2d 876.

of the law of nations." On remand, the district court awarded plaintiffs a $10.4 million judgment.[16]

In holding that the Alien Tort Statute supplied a domestic remedy for customary human rights violations, the Second Circuit relied heavily upon an *amicus curiae* memorandum filed by the United States Justice and State Departments.[17] That memorandum argued that the Alien Tort Statute granted the federal courts subject matter jurisdiction to provide such a remedy, and that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."[18]

Since *Filartiga*, the federal courts have developed a sound jurisprudence based upon the principles articulated by the Second Circuit and the United States in that case. The Second Circuit recently reaffirmed *Filartiga* in *Amerada Hess Shipping Corp. v. Argentine Republic*,[19] and several district courts have followed it to hear suits brought by aliens against other aliens for torts committed abroad in violation of international law.[20] In the only other circuit court decision addressing the question whether the Alien Tort Statute authorizes aliens to sue other aliens for torts committed abroad in violation of international law, *Tel-Oren v. Libyan Arab Republic*,[21] Judge Edwards fully endorsed the Second Circuit's *Filartiga* approach,[22] while Judge Bork took great pains to distinguish *Filartiga* from the case before him.[23] With few exceptions, this line of cases has received strong, virtually unanimous approval from the in-

16. Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984).

17. Drew S. Days, III, William T. Lake, and Stefan A. Riesenfeld, three of the amici on whose behalf this memorandum has been filed, were on the Government's *Filartiga* Memorandum.

18. Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 604.

19. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987) (editors' note: Since the filing of this brief, the Second Circuit's decision in *Amerada Hess* was reversed by the Supreme Court on other grounds. 109 S. Ct. 683 (1989). The Supreme Court's decision rests on the Foreign Sovereign Immunities Act, and does not question the interpretation of section 1350.).

20. *See, e.g.*, Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987)(Jensen, J.); Von Dardel v. USSR, 623 F. Supp. 246 (D.D.C. 1985)(Parker, J.).

21. Tel Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

22. *Id.* at 775-82.

23. *Id.* at 819-20. The third member of the D.C. Circuit's panel, the late Judge Robb, argued that the issue of the statutory construction involved in *Tel-Oren* raised a political question. *See id.* 823-27 (Robb, J., concurring). But as the Supreme Court has recently held, "under the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and [judges] cannot shirk this responsibility merely because [their decision] may have significant political overtones." Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2866 (1986).

ternational legal academy.[24]

The cases consolidated in this appeal are on all fours with *Filartiga*. In each case, alien plaintiffs sue Ferdinand Marcos, a former foreign governmental official, for torts arising, *inter alia*, out of torture he allegedly committed abroad "in violation of the law of nations." Thus, a straightforward application of the principles urged by the United States and applied by the Second Circuit in *Filartiga* would demand that this Court hear plaintiffs' claim. Yet in an amicus brief that the State Department has not joined, the Justice Department reverses the position it took in *Filartiga* only eight years ago, now suggesting that jurisdiction should be denied and the suits dismissed. The Justice Department dismisses the construction of the Alien Tort Statute that it previously endorsed, and which both the courts and commentators have consistently approved, as " 'simply frivolous.' "[25] Instead, the Department asks this Court to reconstrue section 1350 in a way that would not only effectively amend it, but also nullify it.

Under the Justice Department's reinterpretation, the Alien Tort Statute would not provide jurisdiction, as Congress intended, over "any civil action by an alien for a tort only, committed in violation of the law of nations," but only over those suits where, *in addition*: (1) the tort was committed by "citizens of the United States or other persons subject to its jurisdiction" at the time the tort was committed,[26] (2) "under circumstances in which the United States might be held accountable to the offended nation,"[27] (3) Congress has specifically passed a criminal statute defining the conduct as an offense against the law of nations,[28] and (4) alien plaintiffs can demonstrate "a private right of action" derived from that federal statute.[29] None of these novel jurisdictional "conditions" the Justice Department would now impose appear anywhere in the text or legislative history of the statute, or in the considerable body of judicial precedent construing it. Instead, they appear to derive only from the

24. The only prominent exceptions are the much-criticized opinion of Judge Bork in *Tel-Oren*, *see infra* note 76, and portions of a single law review article cited by the Justice Department throughout its brief. *See* J.D. Br. at 8, 11, 16, 25, (citing Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986). As amici note below, however, even that article ultimately does not support the Department's position. *See infra* note 85.

25. J.D. Br. at 20 (quoting Casto, *supra* note 24, at 480).

26. J.D. Br. at 15.

27. *Id.*

28. *Id.* at 26-27.

29. *Id.* at 9-10.

Justice Department's ill-conceived notions of the relationship between international and domestic law.

Amici respectfully urge this Court to reject the Justice Department's reinterpretation. The opinions of persons in the Justice Department may change with the political winds, but questions of statutory construction, federal jurisdiction and international law should not. Rather than creating a split with the Second Circuit, this Court should follow the approach that the United States urged and that the Second Circuit endorsed in *Filartiga*, which a strong line of precedent has now followed. This Court should hold, as the Second Circuit tersely put it, that "the Alien Tort Statute means what it says."[30] The Alien Tort Statute plainly says that the federal courts have original jurisdiction over "any civil action by an alien for a tort only, in violation of the law of nations or a treaty of the United States." Moreover, courts, commentators, and executive branch officials have consistently interpreted that statute to provide a cause of action as well as a federal forum for aliens who have suffered torts in violation of the law of nations.

In this memorandum, amici make two arguments. First, section 1350 jurisdiction is proper where, as here, aliens sue for tortious injuries committed in violation of customary international law, and the alleged tortfeasor has sufficient contacts with the forum to render him liable to suit there. Nothing in the language, history, or purpose of section 1350 supports the Justice Department's attempts to restrict the statute's jurisdictional scope. The statute's original purpose was to ensure that aliens' tort claims raising issues of international law could be adjudicated in federal rather than state courts.

To adopt the Justice Department's proposed amendment to the plain meaning of the statute would be tantamount to reversing the statute's purpose, by redirecting virtually all aliens' tort suits involving violations of the law of nations into state courts. To adopt an interpretation of the Alien Tort Statute that would lead to state court adjudications of these claims would disserve the interests of the United States in the world community, and would show grave disrespect for this nation's federal responsibility in the development, articulation, and enforcement of international law. John Jay's admonition is as true today as it was two hundred years ago, when the Alien Tort Statute was enacted:

> [U]nder the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense, and

30. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987).

> executed in the same manner — whereas adjudications on the same points and questions, in thirteen States . . . will not always accord or be consistent . . . . *The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national Government, cannot be too much commended.*[31]

Second, amici deny that any support exists for the Justice Department's proposed requirement that alien plaintiffs demonstrate a private right of action derived from some statute other than section 1350. The courts have repeatedly held, and the Justice Department has historically asserted, that section 1350 itself provides both a forum *and* a cause of action for aliens who suffer torts in violation of customary international law. To superimpose at this late date the requirement of an additional cause of action would violate Congress' intent in enacting section 1350. Moreover, as the United States maintained in *Filartiga*, customary international law itself provides individuals with a right to seek domestic judicial relief for the egregious human rights violations alleged here.[32]

In sum, neither of the Justice Department's contentions regarding the Alien Tort Statute find any support in statutory language, judicial precedent, or legislative history. They rest almost entirely on a misunderstanding of the relationship between international law and United States law. To adopt that view and promote that misunderstanding would cause far broader disruption and confusion even than the circuit split that the Department advocates. This Court should therefore affirm the widely accepted principles set forth by the Second Circuit in *Filartiga*, and reject the Justice Department's invitation to break new and misconceived ground in international jurisprudence.

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31. THE FEDERALIST No. 3, at 43 (J. Jay) (C. Rossiter ed. 1961) (emphasis added). Even Professor Casto, upon whom the Justice Department relies heavily in its amicus brief, *see supra* note 24, recognizes the danger of narrowly construing the Alien Tort Statute:

> The availability of state courts to try claims arguably within section 1350 means that a narrow construction of the Act will not limit the adjuducation of aliens' claims. Because the excluded cases may still be filed in state court, a narrow construction would vest the state courts with initial and perhaps final responsibility for shaping the course of litigation implicating foreign relations. *To ensure the federal courts' participation in the development and application of legal principles pertinent to aliens' claims, a national forum should be available for adjudication.*

Casto, *supra* note 24, at 510 (emphasis added).

32. Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 604.

ARGUMENT

I. RECOGNIZING JURISDICTION UNDER 28 U.S.C. § 1350 IN THESE CASES WOULD FURTHER CONGRESS' INTENT TO PROVIDE OR RECOGNIZE A FEDERAL FORUM FOR ALIEN TORT CLAIMS ALLEGING INTERNATIONAL LAW VIOLATIONS.

A. *Filartiga* and Its Progeny Compel a Finding of Section 1350 Jurisdiction in These Cases.

In considering the threshold jurisdictional question, this Court does not write on a clean slate. Since 1980, section 1350 litigation has proliferated, and a clear jurisdictional analysis has emerged from the resulting precedent. In *Filartiga*, *Amerada Hess*, *Forti*,[33] *Von Dardel*,[34] and *Adra v. Clift*,[35] federal courts exercised section 1350 jurisdiction over tort claims by aliens for torts committed abroad by persons not subject to United States jurisdiction at the time the tort was committed. Yet in urging this Court to take a different path, the Justice Department fails to note, much less discuss and distinguish, the jurisdictional analysis that has guided these courts.

That analysis rests on the principle that Congress intended to provide aliens with the choice of a federal remedy in these cases because they raise international law issues, and should not ordinarily be litigated in state courts. Thus, the Second Circuit stated in *Filartiga*:

> Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, *wherever the tort occurred*. Moreover, as part of an articulated scheme of federal control over external affairs, Congress provideed, in the First Judiciary Act, § 9(b), 1 Stat. 73, 77 (1789), for federal jurisdiction over suits by aliens where principles of international law are in issue.[36]

Judge Edwards, concurring in *Tel-Oren*, similarly noted that the Framers gave aliens who have suffered torts committed in violation of international law the option to go to federal court, whatever the amount in controversy, to ensure that a state court's unfair adjudication of a transitory

33. Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

34. Von Dardel v. USSR, 627 F. Supp. 246 (D.D.C. 1985).

35. Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).

36. Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980) (emphasis added).

tort would not be cause for an international conflict.[37] In a recent district court decision in this Circuit, Judge Jensen also noted the transitory tort doctrine and stated that "[i]t would appear that Congress intended § 1350 to provide concurrent federal jurisdiction over alien tort claims alleging treaty or customary international law violations in order to facilitate federal oversight of matters involving foreign relations and international law."[38]

The Second Circuit's recent analysis in *Amerada Hess* squarely affirms these principles and forthrightly rejects the complicated conditions the Justice Department would now superimpose on section 1350: "Although seldom employed, the Alien Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations, then the district court has jurisdiction."[39]

The Justice Department does not even cite these cases in the jurisdictional section of its brief, despite their manifest relevance to the issue at hand. Indeed, the Justice Department remains oddly silent even with respect to the decided cases in which federal courts have *denied* section 1350 jurisdiction. The vast majority of those cases have declined jurisdiction on the ground that the tort alleged was not committed in violation of the law of nations.[40] But not a single court has suggested, as the Justice Department now does, that aliens may invoke section 1350 to redress only those torts occurring in U.S. territory, or that have been committed by United States citizens or by persons subject to United States jurisdiction at the time the tort is committed.[41]

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37. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782-86 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

38. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 n.6 (N.D. Cal. 1987). The court in *Adra v. Clift* noted further that, given Congress' decision to accord aliens a federal forum, the courts should be extremely reluctant to negate Congress' intent:

> An alien, understandably though unjustifiably, may prefer to bring an action for a tort in a federal court rather than in a local court, *and Congress has authorized him to do so in this limited class of cases.* The importance of foreign relations to our country today cautions federal courts to give weight to such considerations and not to decline jurisdiction given by an Act of Congress unless required to do so by dominant considerations.

195 F. Supp. 857, 865 (D. Md. 1961)(emphasis added). *See also* Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966)(Section 1350 designed to embrace cases with "international overtones" and presenting issues of "international import").

39. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987).

40. *See, e.g., Tel-Oren*, 726 F.2d at 795-96 (Edwards, J., concurring)(universal consensus does not yet exist to establish terrorist attacks as a law of nations violation); Guinto v. Marcos, 654 F.Supp. 276, 280 (S.D. Cal. 1986) (violation of the First Amendment right of free speech does not rise to the level of a violation of the law of nations).

41. *See* Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the*

B. The History of the Alien Tort Statute Fully Supports the *Filartiga* Approach.

The jurisdictional analysis that these courts have applied fully comports with the historical purpose of the Alien Tort Statute, namely, to ensure aliens the choice of litigating torts that violate international law in a federal, rather than a state, forum. Because defendant in this action, former President Ferdinand Marcos, now lives in Hawaii, plaintiffs could have brought these tort actions against him in Hawaiian state courts under the well-established common law doctrine of "transitory torts." Under that doctrine, which the Supreme Court has dated to Lord Mansfield's 1774 opinion in *Mostyn v. Fabrigas*,[42] injuries to a person are "transitory," in the sense that a plaintiff's right to redress follows the defendant even to foreign lands.[43] The Alien Tort Statute simply provides that where such torts also violate international law, an alien plaintiff may choose to bring the action in federal, rather than state, court. Plaintiffs in these consolidated appeals chose a federal forum, and Congress intended that that choice be honored.

The Alien Tort Statute was part of the First Judiciary Act of 1789, which sought to implement Congress' constitutional power to prescribe lower federal court jurisdiction by placing questions of national import, such as those involving the law of nations or treaties, under the control of federal courts.[44] The Alien Tort Statute reflects Congress' and the Framers' concern that matters touching on foreign relations and international law should be susceptible to adjudication in federal court. The Supreme Court has accordingly described section 1350 as one of several statutes: "reflecting a concern for uniformity in this country's dealings with foreign nations and . . . a desire to give matters of international significance

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Alien Tort Statute, 18 N.Y.U. INT'L L. & POL. 1, 62 (1985) (Alien Tort Statute jurisdiction "has never been denied on the ground that the statute itself does not confer jurisdiction over extraterritorial tort actions").

42. Mostyn v. Fabrigas, 1 Cowp. 161 (1774), *cited in* McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843).

43. The Alien Tort Statute was part of the First Judiciary Act of 1789. The author of that Act, Oliver Ellsworth, had himself applied the transitory tort doctrine in 1786, while a sitting judge. *See* Stoddard v. Bird, 1 Kirby 65, 68 (Conn. 1786)(Ellsworth, J.)("right of action [for a tort] against an administrator is transitory, and the action may be brought wherever he is found"). The Supreme Court has applied the transitory tort doctrine to uphold state jurisdiction over out-of-state torts, McKenna v. Fisk, 42 U.S. (1 How.) 241 (1843)(personal injury suit); Dennick v. Railroad Co., 103 U.S. 11 (1881)(wrongful death action); as well as torts occurring on foreign soil. Slater v. Mexican National R.R. Co., 194 U.S. 120, 126 (1904).

44. *See generally* Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 1), 101 U. PA. L. REV. 26, 34-55 (1952).

to the jurisdiction of federal institutions."[45]

Commentators who have studied the legislative history of the First Judiciary Act, and particularly that of the Alien Tort Statute, unanimously conclude that section 1350 "was intended to avoid local bias in aliens' suits and to obtain uniform judicial interpretation and application of the law in cases implicating international concerns."[46] The Framers' concern, as founders of a small and weak nation, was that if the state courts failed to do justice to an alien's tort claim, that denial of justice might inspire the alien's nation to make war on the United States. Thus, Alexander Hamilton argued forcefully for federal jurisdiction over *all* cases involving aliens:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. *The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States.* But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in treaty or the general law of nations.
>
> And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination

45. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964). Few of these jurisdictional statutes provide for *exclusive* jurisdiction in the federal courts, which would have been unacceptable to that contingent of the Framers that strongly favored states' rights. The legislative purpose underlying most of these statutes was not to bar those claims from state court, but to ensure that the federal courts would be open to them. Thus, the Alien Tort Statute gives aliens the choice to sue in federal court, but permits them to go to state court instead if they so choose.

46. *See, e.g.*, Note, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 132-33 (1986) [hereinafter Note, *Enforcing the Customary International Law*]. *Accord*, D'Amato, *What Does Tel-Oren Tell Lawyers?*, 79 AM. J. INT'L L. 92 (1985); Randall, *supra* note 41, at 11-31; Casto, *supra* note 24, at 472; Comment, *After* Tel-Oren: *Should Federal Courts Infer a Cause of Action Under the Alien Tort Claims Act?*, 3 DICKINSON J. INT'L L. 281, 283 (1985); Note, *Separation of Powers and Adjudication of Human Rights Claims Under the Alien Tort Claims Act*, 60 WASH. L. REV. 697, 699 (1985) [hereinafter Note, *Separation of Powers*].

> between the cases of one complexion and those of the other. *So great a proportion of the cases in which foreigners are parties, involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.*[47]

Particularly with respect to aliens' claims raising substantive questions of international law, this concern even predated the Constitution.[48]

The Alien Tort Statute was Congress' response to all of these concerns. It was designed to direct cases involving issues of foreign relations and international law into the federal judiciary. By so doing, it also diminished the possibility that the United States would find itself answering to another nation for a state court's denial of justice to an alien who had unsuccessfully sought redress against residents of that state for tort claims involving international law violations.[49]

C. The Justice Department Asks this Court to Nullify the Alien Tort Statute by Judicial Construction.

The Justice Department acknowledges that the Alien Tort Statute was motivated by the "Framers' concern that the United States might become involved in an international incident if it failed to provide a fair forum for an alien seeking redress."[50] The Department then asks this

47. THE FEDERALIST, No. 80 at 476-77 (A. Hamilton) (emphasis added). *See also* THE FEDERALIST, No. 3 at 43 (J. Jay); 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 530-36 (Madison)(J.Elliot ed. 1836); *see also* D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988).

48. The Continental Congress, which lacked the legislative power to do more, exhorted the states to enact legislation providing judicial remedies, both criminal and civil, for violations of treaties of the United States and the law of nations. 21 J. CONT. CONG. 1136-37 (1781). Both Edmund Randolph and James Madison complained at the Constitutional Convention of the Continental Congress' inability to give effect to the law of nations under the Articles of Confederation. 1 M. Farrand, *The records of the Federal Convention of 1787* 24-25 (1911)(Randolph); *id.* at 316 (Madison); *see also* Casto, *supra* note 24, at 490-94. And as the Justice Department correctly points out, J.D. Br. at 10-11, the 1784 Marbois incident — in which an alien who assaulted a foreign diplomat was tried criminally in a state court — raised grave concern, precisely because it demonstrated the federal government's vulnerability when international law claims were cognizable only in state courts. *See, e.g.*, Randall, *supra* note 41, at 24-28.

Where the Department errs, however, is in assuming that the Marbois incident inspired the Congress that enacted the Alien Tort statute to reach only those international law violations that "occurred within the legislative jurisdiction of the United States and under circumstances in which the United States might be viewed as responsible under international law." J.D. Br. at 11. As one commentator has noted, "the statute was drafted more broadly than would have been necessary to provide civil jurisdiction in only that case." Randall, *supra* note 41, at 27.

49. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 783; Randall, *supra* note 41, at 20-22.

50. J.D. Br. at 8.

Court, however, to rewrite the statute to address that concern in a way that Congress never intended. Eschewing Congress' chosen language for the statute, which grants jurisdiction for "*any* civil action by an alien for a tort only, in violation of the law of nations" (emphasis added), the Justice Department would limit section 1350 jurisdiction to those actions brought by aliens for (1) torts committed by "United States Citizens or other persons subject to its jurisdiction,"[51] (2) where the tortfeasor is subject to United States jurisdiction at the time when the tort was committed,[52] and (3) where "a cause of action is afforded by federal law of the United States enacted pursuant to the Law of Nations Clause [of the Constitution],[53] in order to 'define and punish' violations of the law of nations that are the responsibility of the United States."[54]

None of these limitations finds any support in the statutory language. The plain language of the Alien Tort Statute authorizes jurisdiction over "any" alien's action for a tort in violation of international law, whoever the tortfeasor may be and wherever the tort may have occurred, and does not require the enactment of any other statute.[55] "Absent a clearly expressed legislative intention to the contrary, the statutory language must be regarded as conclusive."[56] Yet in arguing for a dramatic new restriction on Congress' choice of the inclusive term "any," the Jus-

51. J.D. Br. at 19.

52. Although the Justice Department never expressly states that Alien Tort defendants must be subject to United States jurisdiction *when they committed the tort*, that conclusion follows inevitably from its recommendation that this Court deny § 1350 jurisdiction over these cases. Otherwise, the Justice Department would be urging this Court to recognize jurisdiction here, for clearly former President Marcos is "a person subject to [United States] jurisdiction" now that he is a resident of Hawaii, just as Pena-Irala was subject to United States jurisdiction in *Filartiga*. *See Filartiga*, 630 F.2d at 878 ("whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction").

53. U.S. CONST., art. I, § 8, cl. 10.

54. J.D. Br. at 9-10.

55. This does not mean, of course, that every tort somehow connected to an international law violation would proceed to judgment in a federal court. There are substantial procedural limitations on such suits, including, most importantly, the threshold requirements that the tortfeasor be subject to service of process and amenable to personal jurisdiction here. In addition, doctrines such as standing, sovereign and official immunity, the act of state doctrine, exhaustion of local remedies, and *forum non conveniens* may play a part in determining whether federal courts will in fact decide many of these Alien Tort actions. For an enumeration and discussion of these procedural limitations, *see* Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 181-84, 202-08 (1987). Through a straightforward application of the above principles, a federal judge could protect his docket from unmeritorious § 1350 suits, without accepting the strained jurisdictional reading of the statute that the Department now urges.

56. Tulalip Tribes v. FERC, 732 F.2d 1451, 1455 (9th Cir. 1984) (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

tice Department offers only conjecture and speculation.[57] The Justice Department speculates, for example, that the Framers were concerned with providing remedies, not for all violations of the law of nations that harmed aliens and that would otherwise be adjudicable in state courts, but only for those for which the United States itself could be held legally responsible.[58] Nothing in the Framers' statements, the legislative history of the statute, or its subsequent interpretations by courts, commentators, or the Executive Branch itself, suggests that this limitation on the express language was contemplated, let alone intended.

The Justice Department's speculation, moreover, appears based upon fundamental misunderstandings of both the nature of our nation's international obligations and the scope of the Framers' concerns for uniformity in international law cases involving aliens. The Justice Department argues, for example, that the scope of *civil* jurisdiction under the Alien Tort Statute should be determined and limited by principles and legislative actions concerning *criminal* jurisdiction.[59] With all due respect, the Justice Department's confusion over civil and criminal actions should not be attributed to the Framers of the Alien Tort Statute.[60]

Our nation's obligations and enforcement powers under international law are not limited solely to criminal enforcement of those selected laws of nations that Congress has chosen to "define and punish" by criminal statute. As amici have demonstrated, the Framers feared that the aliens remitted solely to state court remedies would more likely suffer denials of justice.[61] "The denial or perversion of justice by the sentences

57. J.D. Br. at 12-20.

58. J.D. Br. at 15.

59. J.D. Br. at 9-10, 13-14.

60. The Justice Department attempts to lend its confusion an air of constitutional respectability by suggesting that the constitutional basis for 28 U.S.C. § 1350 derives solely from Congress' power "[t]o define and punish . . . offenses against the Law of Nations," under Article I, § 8, Clause 10. J.D. Br. at 10 ("the Alien Tort Statute was passed only two years after the Constitution was adopted and implements the Law of Nations Clause of the Constitution."). Yet this argument ignores the Statute's real constitutional basis, namely, the "arising under" clause of Article III of the Constitution and Congress' power to create lower federal courts and to prescribe their jurisdiction. *See* U.S. CONST. art. I, § 8, cl. 9; art. III, §§ 1 & 2. The question whether a tort has been committed in violation of the law of nations "necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Article III." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983). This would be true regardless of whether the suit was later tried under a substantive standard of liability prescribed by municipal law, *see infra* note 99, or by international law, *see infra* Part IIB. Thus, whatever substantive limitations the Department might seek to read into article I's Law of Nations Clause, J.D. Br. at 18, clearly would not apply to the Alien Tort Statute, which rests upon these other sources of congressional power.

61. *See supra* notes 45, 46, and accompanying text.

of courts" was precisely Hamilton's concern.[62] He argued that the United States might be held internationally responsible for "an unjust sentence against a foreigner."[63] Certainly that was true where the state courts had rendered a decision "which violated the stipulations in a treaty or the general law of nations."[64] To insure that our international law obligations to avoid a "denial or perversion of justice" was fulfilled, Congress drafted section 1350 broadly, to provide civil access in federal court to aliens for "any" tort committed against them — whoever the tortfeasor may be, wherever the tort may have occurred, and without regard to Congress' criminal enactments — so long as that tort was committed in violation of the law of nations. The Department's narrow construction of section 1350, which makes the availability of civil relief for international law violations contingent upon Congress' domestic decisions to impose criminal sanctions for those acts, simply ignores this important aspect of our international obligations. The differences between criminal enforcement of international law and the provision of civil judicial access are also reflected in the customary international law doctrines governing "jurisdiction to prescribe and enforce" and "jurisdiction to adjudicate."[65] The former govern the state's power to "make its law applicable to [personal] activities, relations, or status," principally by legislation, and to "induce or compel compliance or punish non-compliance . . . with its laws," while the latter concerns a state's authority "to subject persons or things to the process of its courts or administrative tribunals."[66]

The international comity concerns that restrain a nation's attempts to legislate or punish criminal conduct that occurs abroad — for example, by criminalizing attacks on diplomats that take place overseas — do not equally restrain a nation from adjudicating a private tort dispute between persons within its own borders. Thus, the jurisdictional limits that international law places upon the extraterritorial application and enforcement of United States criminal law do not restrict the power of United States courts to adjudicate civil suits against alleged torturers

62. THE FEDERALIST No. 80, *supra* note 47, at 476 (A. Hamilton).

63. *Id.* at 477.

64. *Id.* Hamilton argued for an even broader proposition, that the United States could be held responsible for an unjust sentence against a foreigner even where *no* international law whatsoever was involved. While his view that all actions involving aliens should be in federal courts did not totally prevail, both the diversity statute, 28 U.S.C. § 1332 (1982), and the Alien Tort Statute reflect his concern.

65. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Proposed Final Draft) § 401 [hereinafter THIRD RESTATEMENT].

66. *Id.*

who are currently subject to United States judicial jurisdiction.[67]

In addition, the Justice Department's constricted view of section 1350's scope fails to account for the Framers' concern for uniformity, a concern totally separate from questions regarding the United States' international obligations. The Framers' desire to consolidate questions of foreign relations and international law in the federal judiciary was not limited to situations where the United States was responsible for criminal enforcement of offenses against the law of nations. Rather, the Framers determined, after the experiences of the Continental Congress, that all matters of foreign relations and international law, when possible, should be adjudicated in federal courts, as much for uniformity's sake as to honor our specific international obligations.[68]

Thus, far from providing the clear contrary authority necessary to justify a judicial departure from section 1350's literal terms, the historical evidence in fact supports a reading of those terms consistent with their plain meaning: that Congress intended to provide federal jurisdiction for "any civil action by an alien for a tort only, in violation of the law of nations or a treaty of the United States." Because the actions consolidated here for appeal allege such torts, jurisdiction lies under section 1350.

II. PLAINTIFFS HAVE A RIGHT TO SUE UNDER 28 U.S.C. § 1350 FOR TORTS COMMITTED IN VIOLATION OF CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW.

As with the jurisdictional question, this Court will not write on a clean slate with respect to the issue of a private cause of action. The courts in *Filartiga*, *Amerada Hess*, *Von Dardel*, *Forti*, and *Adra*, as well as Judge Edwards in *Tel-Oren*, all found that aliens have a right to sue under section 1350 for torts committed against them in violation of the law of nations. Thus, Judge Kaufman concluded in *Filartiga*, at the United States' express urging, that section 1350 "open[s] the federal courts for adjudication of the rights already recognized by international

67. *Cf.* Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 605 (The fact that both international law and the defendant's local law prohibit torture, "significantly reduces the likelihood that enforcement would cause undesirable international consequences and is therefore an additional reason to permit private enforcement" of plaintiff's claim).

68. *See, e.g.*, THE FEDERALIST No. 3 at 43 (J. Jay)("The wisdom of. . .committing such questions to the jurisdiction. . .of courts appointed by and responsible only to one national government cannot be too much commended.").

law."[69] As Judge Edwards in *Tel-Oren* and Judge Jensen in *Forti* made clear, *Filartiga* has established that "section 1350 *itself* provides a right to sue for alleged violations of the law of nations."[70]

Until recently, the Justice Department had consistently supported that view. As early as 1795, Attorney General Bradford stated that section 1350 would provide a civil "remedy" to private British citizens for injuries suffered in Africa at the hands of French and American citizens.[71] In 1907, Attorney General Bonaparte reiterated that the Alien Tort Statute "provide[s] a forum *and a right of action*" for torts committed in violation of United States treaties or the law of nations.[72] More recently, the Justice Department maintained in 1980 in its memorandum in *Filartiga*, that because official torture is a "tort . . . committed in violation of the law of nations," it gives rise to a judicially enforceable remedy under section 1350.[73]

Barely acknowledging this judicial and executive precedent, the Justice Department now reverses the position it has maintained over almost two centuries, alleging that section 1350 provides aliens no remedy at all unless a separate private right of action can be inferred from some statute other than section 1350.[74] Now claiming that section 1350 is "purely

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69. Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

70. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 780 (D.C. Cir. 1984) (Edwards, J., concurring)(emphasis added); *id.* at 777 ("section 1350 Provides a Right of Action and a Forum")(emphasis omitted); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

71. 1 Op. Att'y. Gen. 57, 59 (1795). Attorney General Bradford stated:

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the Unitied States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or of a treaty of the United States.

Id. (emphasis in original). "While opinions of the Attorney General are not binding, they are entitled to some deference, especially where judicial decisions construing a statute are lacking." *Tel-Oren*, 726 F.2d at 780 n.6 (Edwards, J., concurring); *accord*, Oloteo v. INS, 643 F.2d 679, 683 (9th Cir. 1981).

72. 26 Op. Att'y. Gen. 250, 252-53 (1907)(emphasis added).

73. *See* Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 601-06.

74. The Department's brief mentions only the Attorney General's 1907 opinion, and offers a most unconvincing rebuttal to *Filartiga*. The Department claims that the Attorney General's 1907 opinion, J.D. Br. at 20-21 n.17, arose under the "treaty" language of § 1350, ignoring Attorney General Bonaparte's express assertions that the "statutes provide a right of action and a forum" and that the aliens could recover under them if "the diversion of the water was an injury to substantial rights of citizens of Mexico *under the principles of international law* or by treaty, and could only be determined by judicial decision." 26 Op. Att'y Gen. 250, 253 (1907)(emphasis added). The Attorney General's opinion attaches no significance, as the Department now does, to the claims that the injury occurred in the United States and involved a right of action "familiar to domestic law." J.D. Br. at 20-21 n.17.

The Department's attempt to distinguish *Filartiga* is even less persuasive. Claiming that the Second Circuit took no position on the cause of action question, *see* J.D. Br. at 21-22 n.18,

jurisdictional,"[75] the Department asserts that neither treaties nor customary international law create judicially enforceable rights of action in favor of the plaintiffs, and that therefore the only remaining sources for a right of action are federal statutes defining criminal offenses against the law of nations.[76]

Amici maintain that Congress enacted section 1350 in order to provide aliens with an effective civil remedy for torts committed in violation of the law of nations. Adoption of the Justice Department's new interpretation would defeat that purpose. Whether section 1350 is viewed as providing a cause of action itself, as the Justice Department has previously viewed it, or as merely providing a federal forum for causes of action arising under municipal or international law, as others have suggested, plaintiffs have clearly stated a claim enforceable in federal court.

A. Section 1350 Provides a Cause of Action for Aliens Victimized by Torts Committed in Violation of the Law of Nations.

As Judge Jensen recently held in *Forti*, "[t]here appears to be a growing consensus that section 1350 provides a cause of action for cer-

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the Department ignores Judge Edwards' conclusion in *Tel-Oren* that the "view of the Second Circuit, which I endorse, [is] that section 1350 itself provides a right to sue for alleged violations of the law of nations." 726 F.2d at 780 (Edwards, J., concurring). In *Tel-Oren*, Judge Edwards correctly read *Filartiga* to hold "that aliens granted substantive rights under international law may assert them under § 1350." *Id.* at 780 n.5. For that reason, "[t]he existence of an express or implied cause of action was immaterial to the jurisdictional analysis of the Second Circuit." *Id.* at 780 "[E]nforceability [of the right] is established by the existence of an individual right such a cause would seek to vindicate." Schneebaum, *The Enforceability of Customary Norms of International Law*, 8 BROOKLYN J. INT'L L. 289, 305 (1982). Thus, plaintiffs here have a right to sue not because the law of nations "grants" them a private "cause of action," but because, as the Government pointed out in *Filartiga*, "official torture is a tort and gives rise to a judicially enforceable remedy." Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 601.

75. J.D. Br. at 20.

76. *Id.* at 20-31. Unlike the Justice Department's jurisdictional arguments, which find absolutely no support in judicial opinions, the Justice Department's "cause of action" analysis has a lone supporter: Judge Bork's concurring opinion in *Tel-Oren*, 726 F.2d at 798. Yet the Justice Department itself has previously characterized that opinion as having "little, if any precedential value." *See* Brief of the United States as Amicus Curiae, filed in opposition to the petition for certiorari, Tel-Oren v. Libyan Arab Republic, No. 83-2052 (January 1985) at 9, 24 I.L.M. 427. 432 (1985). Moreover, Judge Bork's view has never been followed by any court, and has been criticized sharply by both courts and commentators. For criticism of Judge Bork's view, *see e.g.*, *Tel-Oren*, 726 F.2d at 778-80, 788-91 (Edwards, J., concurring); *Forti*, 672 F. Supp. at 1539; D'Amato, *supra* note 46, at 92; Note, *Enforcing the Customary International Law*, *supra* note 46, at 157; Koh, *supra* note 55, at 203 n.11; Randall, *Further Inquiries Into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473, 479-85 (1986); Note, *Separation of Powers*, *supra* note 46, at 714; Comment, *Tel-Oren v. Libyan Arab Republic: Redefining the Alien Tort Claims Act*, 70 MINN. L. REV. 211 (1985).

tain 'international common law torts.' "[77] This judicial consensus is reflected in, and reinforced by, the scholarly literature.[78]

Congress in section 1350 authorized a private remedy for aliens who have suffered from torts committed in violation of customary international law. As the Second Circuit recognized, customary international law is a developing, not a static, body of law, and "courts must interpret [it] not as it was in 1789, but as it has evolved and exists among the nations of the world today."[79] Thus, section 1350 marks a choice by Congress to vest the *federal judiciary* with the continuing authority to grant aliens domestic civil remedies for international wrongs, even as international law evolves.[80]

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77. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (citing *Filartiga*, 630 F.2d 876); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777-82 (D.C. Cir. 1984)(Edwards, J., concurring) *cert. denied*, 470 U.S. 1003 (1985); Guinto v. Marcos, 654 F. Supp. 276, 279-80 (S.D. Cal. 1986); Von Dardel v. USSR, 623 F. Supp. 246, 256-59 (S.D. Cal. 1986); Siderman v. Republic of Argentina, No. CV 82-1772-RMT(Mex)(C.D. Cal. March 12, 1984), *vacated on other grounds* (C.D. Cal. March 7, 1985)(LEXIS, Genfed Library, Dist. file).

78. *See, e.g.*, Randall, *supra* note 76, at 479-89 (concluding that "either by simple statutory construction or by inference based on congressional intent, the requisite elements of the Alien Tort Statute, if met, provide a plaintiff with a private cause of action"); Comment, *supra* note 46, at 309-13 (applying *Cort v. Ash* test and finding a cause of action); Note, *Separation of Powers*, *supra* note 46, at 714-20; Note, *Limiting the Scope of Federal Jurisdiction Under the Alien Tort Statute*, 24 VA. J. INT'L. L. 941, 956-60 (1984); Comment, *supra* note 76, at 220; Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L LJ. 53, 87-97 (1981); Schneebaum, *supra* note 74, at 300-07.

79. *Filartiga*, 630 F.2d at 881; The Paquete Habana, 175 U.S. 677, 694 (1900).

80. Thus, § 1350 can be viewed as authorizing the federal courts to fashion a federal common law of domestic remedies for "torts . . . committed in violation of the law of nations." Koh, *supra* note 55, at 186 n.64, 205-06 nn. 119, 124; Blum & Steinhardt, *supra* note 78, at 98-102.

The district court on remand in *Filartiga* adopted this position, applying international law to authorize punitive damages despite the fact that punitive damages were not allowed under Paraguayan law. It held that "[b]y enacting Section 1350, Congress entrusted [the task of enforcing international law] to federal courts, and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law." Filartiga v. Pena-Irala, 577 F. Supp. at 860, 864 (E.D.N.Y. 1984); *see also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451, 456 (1957)(jurisdictional statute "authorizes federal courts to fashion a body of federal [common] law" even where existing common law *forbade* private right of action). The Justice Department does not mention the district court's decision on remand in *Filartiga*, and attempts to distinguish *Lincoln Mills* on the ground that labor law was "already pervasively regulated by substantive federal law." J.D. Br. at 31 n.27. What the Department ignores is that the courts have traditionally viewed international law and foreign relations issues at least as strongly as a federal matter. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)("an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law"); Moore, *Federalism and Foreign Affairs*, 1965 DUKE L.J. 248, 261-84; Dickinson, *supra* note 44, at 792.

In *Filartiga*, the Second Circuit concluded that only those norms that command international consensus and are of "mutual, and not merely several, concern," are directy actionable under the statute.[81] The actions alleged in these consolidated appeals — torture, summary execution, disappearance, and arbitrary detention — violate customary international human rights norms that fit that description.[82] Thus, section 1350 confers a cause of action on plaintiffs to sue in federal court.

The Justice Department rejects this position, stating, virtually without argument, that section 1350 "is purely jurisdictional."[83] Therefore, it contends, the alien's cause of action must be derived elsewhere, possibly in the criminal statutes Congress passes to punish "offenses against the law of nations."[84] Quoting a single law review article, the Department dismisses the widely accepted view that section 1350 provides both a forum *and* a cause of action as " 'simply frivolous.' "[85]

The Department's new interpretation wholly ignores the Supreme Court's directive that, in determining the existence of a cause of action, "the ultimate question is one of congressional intent."[86] Thus, the relevant question is whether the Congress that enacted section 1350 in 1789 intended that its remedial mechanism be available only to those aliens

81. Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980)(citing ITT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975)(Friendly, J.)).

82. *See* THIRD RESTATEMENT, *supra* note 65, at § 702.

83. J.D. Br. at 20.

84. Although the Department initially cautions that it "does not mean to suggest that principles of international law may not be applied in United States courts unless they have first been affirmatively enacted into law by Congress," J.D. Br. at 10 n.7, it goes on to imply that alien plaintiffs may sue under § 1350 only when they can find civil causes of action in criminal statutes that authorize federal prosecutors to bring criminal actions for certain law of nations offenses. *Id.* at 20-21. Yet the plain language of § 1350 is far more susceptible to the implication of a civil cause of action than are the various criminal statutes in which the Justice Department would locate causes of action instead. *See* J.D. Br. at 26, 27 n.22. Section 1350 itself explicitly confers upon a particular class of claimants — aliens — the right to bring a specific type of *civil* action — "for a tort only" — under certain circumstances — when the tort has been "committed in violation of the law of nations."

85. J.D. Br. at 20 (quoting Casto, *supra* note 24, at 480). Even the sole law review article quoted by the Justice Department does not ultimately support its position. Professor Casto, while concluding that § 1350 does not itself provide a cause of action, Casto, *supra* note 24, at 480, nevertheless recognizes that § 1350 might "create a federal forum in which federal judges are given power to implement the law of nations by fashioning appropriate federal domestic remedies." *Id.* Thus, he too, rejects Judge Bork's "narrow construction" of the Statute, *id.* at 499-501, ultimately concluding that "[i]f the statute is construed narrowly, judicial power over this litigation will be left primarily to the state courts. Instead, section 1350 and pertinent provisions of Constitution should be construed as broadly as possible . . . ." *Id.* at 525. *Accord, id.* at 472. This approach, of course, is consistent with the view expressed here. *See supra* note 55.

86. Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

who could demonstrate a private right of action by inference from preexisting criminal statutes defining "offenses against the law of nations." It seems most unlikely Congress so intended, given that the very notion of a "private cause of action" did not even develop until almost seventy years later, in 1848.[87] Moreover, because no criminal statutes existed in 1789 that defined and punished offenses against the law of nations, the Justice Department's view would have the authors of the First Judiciary Act writing a statute that afforded federal jurisdiction over an entire class of non-actionable "torts," a concept that would have been entirely foreign to the Framers.

In fact, the Framers had a much simpler view: that transitory torts were indeed actionable, and were directly actionable in federal court so long as they had also been "committed in violation of the law of nations."[88] Justice Peterson, a principal drafter of the First Judiciary Act, "assumed, as did all his contemporaries, that domestic common law incorporated the law of nations and provided domestic remedies for violations of the law of nations."[89] Thus, the statute that most clearly confers upon aliens the right to sue for law of nations violations is the Alien Tort Statute itself.

The only substantive argument the Justice Department advances regarding this point refutes its own position. Arguing that "[a]nalogous federal jurisdictional statutes likewise do not create private rights of ac-

87. *See* Davis v. Passman, 442 U.S. 228, 238 (1979); D'Amato, *supra* note 46, at 95-96.

88. 1 Op Att'y Gen. 57, 59 (1795).

89. Casto, *supra* note 24, at 480; *see also* Letter from Sec. of State T. Jefferson to French Minister (June 5, 1793), *reprinted in* 7 *The Works of Thomas Jefferson* 362, 364 (Ford ed. 1904). Federal jurisdiction to provide domestic remedies for violations of the law of nations was recognized repeatedly in prize cases in which plaintiffs often sought restitution for seizures of goods that allegedly violated the law of nations. *See, e.g.*, The Paquete Habana, 175 U.S. 677 (1900); The Santissima Trinidad, 20 U.S. (7 Wheat) 283 (1822); Talbot v. Janson, 3 U.S. (3 Dall) 133 (1755); *see also* J. Kent, COMMENTARIES ON AMERICAN LAW 186 (1987)("the law of nations, and the municipal laws of every country, authorize the owner to reclaim his property taken by pirates, wherever it is found"). In all of these cases, plaintiffs had a right to a remedy directly under the law of nations; none of the courts required that a "private right of action" be inferred from a criminal "law of nations" statute. Indeed, it was in this context that the Supreme Court in the *Paquete Habana* made the now-famous assertion that

> International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction *as often as questions of right depending upon it are duly presented for their determination.* For this prupose, where there is no treaty, and no controlling executive *or legislative act* or judicial decision, *resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators* . . . .

175 U.S. at 700 (emphasis added). *See,* Casto, *supra* note 24, at 480; *see also* Letter from Sec. of State T. Jefferson to French Minister, *supra* this note, at 364 (Ford ed. 1904).

tion,"[90] the Department cites the federal question provision, 28 U.S.C. § 1331, and *Handel v. Artukovic*.[91] In *Handel*, however, the court took pains to distinguish between section 1350's requirement that a plaintiff show only a "violation" of the law of nations, and section 1331's requirement that plaintiff's claim "arise under" the substantive law.[92] Following Judge Edwards' concurrence in *Tel-Oren*, the *Handel* court stated that "the 'violation' language of section 1350 *may be interpreted as explicitly granting a cause of action*" even if "the 'arising under' language of section 1331 cannot. . . ."[93] As Judge Edwards explained in *Tel-Oren*:

> Unlike section 1331, which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action. The language of the statute is explicit on this issue: by its express terms, nothing more than a *violation* of the law of nations is required to invoke section 1350. . . . Congress, of course, knew full well that it could draft section 1350 with 'arising under' language, or the equivalent, to require a 'cause of action' or 'right to sue,' but it chose not to do so. There simply is no basis in the language of the statute, its legislative history or relevant precedent to read section 1350 as though Congress had required that a right to sue must be found in the law of nations.[94]

Like its jurisdictional argument, the Justice Department's attempt to superimpose a "cause of action" requirement upon section 1350 runs afoul of a basic maxim of statutory construction: that a statute should not be construed so as to render any part of it "superfluous, void, or insignificant."[95] Where a cause of action can be inferred under some other federal statute, jurisdiction would by definition lie under 28 U.S.C. § 1331, for the claim would then "arise under" a federal law. Thus, if the Justice Department is correct, section 1350 serves no purpose. Although section 1350 was passed prior to section 1331, it was retained long after the section 1331 "federal question" provision had become well-established. The Justice Department offers no explanation why Congress has bothered to retain and recodify a redundant jurisdictional statute. The most sensible explanation, of course, is that section 1350 is *not* re-

90. J.D. Br. at 21.

91. Handel v. Artukovic, 601 F. Supp. 1421, 1426-27 (C.D. Cal. 1985).

92. *Id.* at 1426-27.

93. *Id.* at 1427 (emphasis added).

94. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 (D.C. Cir. 1984) (emphasis in the original) (Edwards, J., concurring) *cert. denied*, 470 U.S. 1003 (1985).

95. C. Sands, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed.1973).

dundant. It explicitly creates a cause of action for torts committed in violation of the law of nations.

The Justice Department claims that separation of powers is "a compelling factor counselling hesitation" against recognizing a cause of action here.[96] Invoking Judge Bork's isolated approach in *Tel-Oren*, the Department urges this Court to impress a cause of action requirement upon the Alien Tort Statute which would effectively nullify it. As one judge has recognized, a court that adopted such an approach would exceed its judicial function, for such an approach would "rewrit[e] Congress' words and renounc[e] the task that Congress has placed before" the court.[97] It would be ironic indeed if undifferentiated separation of powers concerns led this Court to adopt an approach to the Alien Tort Statute that effectively read it off the books.[98]

B. Even if Section 1350 Is Not Viewed as Granting a Cause of Action, Plaintiffs Have a Right of Action under International Human Rights Law.

Even accepting *arguendo* the Justice Department's position that section 1350 does not itself provide a cause of action, it does not follow that plaintiffs lack an enforceable right of action. This Court may find that plaintiffs can derive a cause of action from municipal tort law[99] or di-

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96. J.D. Br. at 25 n.21.

97. *Tel-Oren*, 726 F.2d at 791 (Edwards, J., concurring).

98. Individual judges concerned about separation of powers problems could address those concerns in individual cases by applying existing doctrines of federal jurisdiction on a case-by-case basis, rather than by adopting a reading of the Alien Tort Statute that would effectively reduce it to a dead letter. *See* Koh, *supra* note 55, at 202-08 & n.113.

99. For example, some judges have suggested that § 1350 is a forum-shifting statute, and that a plaintiff's cause of action thus derives from municipal tort law. *See, e.g., Tel-Oren*, 726 F.2d at 782-88 (Edwards, J., concurring); *cert. denied*, 470 U.S. 1003 (1985); Adra v. Cliff, 195 F. Supp. 857 (D. Md. 1985). Under this view, which the Department's brief nowhere mentions, an alien plaintiff would derive his affirmative right to sue from the relevant state or national tort law (as determined by applying traditional choice-of-law principles), which would provide the substantive standard for liability, just as it would in an ordinary state transitory tort action. *See* Randall, *supra* note 41, at 33-39. If plaintiff could further allege that the tort were "committed in violation of the law of nations," that allegation would suffice to shift the tort suit into federal court. There, it would be tried under the relevant municipal tort law, just as an allegation that two parties are diverse and that the jurisdictional amount in controversy exists would suffice under 28 U.S.C. § 1332 to "shift" a state tort claim into federal court to be tried under the relevant state tort law. While this "forum-shifting approach" would admittedly represent a "minority view," Randall, *supra* note 41, at 36, it nonetheless claims more adherents than the Justice Department's singular position. More important, this view, unlike the Department's position, at least comports with the drafters' purpose of directing these cases into federal tribunals.

The exercise of § 1350 jurisdiction would be constitutional under this approach even if the

rectly from international law. Since Nuremberg, the customary international law of human rights has developed to the point where it provides individuals with a right to invoke it directly in domestic courts. As the United States itself established in its Memorandum in *Filartiga*, a right of action can be located *in international law itself* for certain egregious customary international law violations.[100]

Arguing that the law of nations "does not give plaintiffs a private right of action,"[101] the Justice Department now effectively renounces the position it maintained in *Filartiga*. Its argument, however, rests on a profound misunderstanding of the relation between customary international law and U.S. law, one which attempts to resurrect a strictly "statist" view of international law that neither the Framers nor contemporary international law scholars accept.

The Justice Department maintains that "the traditional role of the 'law of nations' is not the creation of private rights."[102] But it is precisely this "traditional" view of international law that the Government's 1980 *Filartiga* Memorandum pointed out had long been rejected.[103] In *Filartiga*, the United States explained that international law had evolved considerably since the days when states were viewed as absolutely sovereign with regard to treatment of their own citizens, and that international law was deemed part of municipal law only when municipal law expressly incorporated it.[104] The United States' *Filartiga* Memorandum carefully delineated the development of an international law of human rights, from "[e]arly in this century" to 1980.[105] The Memorandum demonstrated the obsolescence of the view that international law is wholly international, and established that customary international law guarantees individuals "certain fundamental human rights," including the right to be

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substantive law ultimately applied were not federal law. This is because the necessary substantive threshold determination of whether the law of nations or a treaty of the United States has been violated is a federal question. *See Tel-Oren*, 726 F.2d at 787 n.19 (Edwards, J., concurring); *cf. supra* note 60 (citing Verlinden B.V. v. Central Bank Of Nigeria, 461 U.S. 480, 493 (1983)(when a case "necessarily raises questions of substantive federal law at the very outset," it "clearly 'arises under' federal law, as that term is used in Article III")). *See also* Republic of Philippines v. Marcos, 806 F.2d 344, 352-54 (2d Cir. 1986)(holding that claim against Marcos for cause of action under state law may be heard in federal court, because "there is federal question jurisdiction over actions having important foreign policy implications"), *cert. dismissed sub nom.*, Ancor Holding, N.V. v. Republic of Philippines, 107 S. Ct. 1597 (1987).

100. *See* Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 601-06.

101. J.D. Br. at 24.

102. *Id.* at 27.

103. Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 601-602.

104. *Id.*

105. *Id.* at 589-95.

free from torture.[106] This evolution, the United States explained, is also reflected in the international law of remedies:

> A corollary to the traditional view that the law of nations dealt primarily with the relationship among nations rather than individuals was the doctrine that generally only states, not individuals, could seek to enforce rules of international law. . . . Just as the traditional view no longer reflects the state of customary international law, neither does the latter doctrine. . . . The more recently evolved international law of human rights similarly endows individuals with the right to invoke international law, in a competent forum and under appropriate circumstances.[107]

This historical evolution portrayed by the United States' Government *Filartiga* Memorandum has been widely accepted among scholars.[108]

Thus, modern international law recognizes that individuals may invoke domestic remedies for violations of certain fundamental norms of international human rights law, such as torture.[109] The Universal Declaration of Human Rights, which is widely acknowledged as reflecting binding norms of customary international law,[110] guarantees the follow-

106. *Id.* at 589, 595-601.

107. Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 602.

108. *See* THIRD RESTATEMENT, *supra* note 65, Part VII, Introductory Note; *id.* at § 907 comment a ("If a rule of customary international law has become a part of United States law, a domestic remedy may be available for its enforcement"); Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L.S. L. REV. 11 (1978); Janis, *Individuals As Subjects of International Law*, 17 CORNELL INT'L L. J. 61 (1984); Schneebaum, *supra* note 74; Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

109. This modern view of international law obligations, moreover, comports with the views of the Framers, who considered the law of nations to apply universally through the common law, creating rights and obligations for individuals as well as states. *See*, supra notes 86-95 and accompanying text; Note, *Enforcing the Customary International Law*, *supra* note 46, at 198; Dickinson, *supra* note 44, at 26-27, 792; 1 Op. Att'y. Gen. 68, 69 (1797)(Lee)("The common law has adopted the law of nations in its fullest extent, and made it a part of the law of the land"). *See also* The Paquete Habana, 175 U.S. 679, 700 (1900).

110. The Justice Department now dismisses this document as "merely aspirational" and "precatory." J.D. Br. at 28 n.24. Yet in its *Filartiga* memorandum, the Department took precisely the opposite position, *i.e.*, that the Universal Declaration of Human Rights reflects customary international law binding on all states. *See* Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 593. The Second Circuit acknowledged this view in reaching its decision in *Filartiga*. *See* Filartiga v. Pena-Irala, 530 F.2d 876, 883 (2d Cir. 1980)("several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law"). Moreover, in the *Hostages Case* before the International Court of Justice, the United States invoked six articles from the Universal Declaration as reflections of binding customary international law enforceable against Iran. *United States Memorial in United States Diplomatic and Consular Staff in Teheran (United States v. Iran)*, 1980 I.C.J. 3, *cited in* Lillich, *Role of Domestic Courts in Enforcing International Human Rights Law*, PROC. AM. SOC. INT'L L. 20, 23 (1980). Given that the United States' representa-

ing procedural right:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.[111]

The International Covenant on Civil and Political Rights, also cited by the United States before the World Court in the *Hostages Case* and by the *Filartiga* court as evidence of customary international law,[112] similarly obligates states to provide individuals with "an effective remedy" for violations of human rights.[113]

While nations have discretion regarding which "national tribunals" will provide the effective remedy required, once an individual seeks redress from one tribunal the burden rests on the respondent to show that another effective tribunal is more appropriate. Where, as here, there is no effective remedy other than the domestic judicial remedy, customary law requires that that judicial remedy be made available.

The practice of nations, like the United States, that recognize international law as part of domestic law further confirms the customary obligation of the United States to provide effective judicial remedies for violations of fundamental human rights.[114] Precedents from the nineteenth century prize cases[115] to the twentieth century expropriation cases[116] make clear that the direct enforceability of customary inter-

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tions in the International Court of Justice and in *Filartiga* reflect the international consensus, there can be no warrant for the Justice Department's sudden "demotion" of this document. *See* R. Lillich & F. Newman, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 66 (1979).

111. Universal Declaration of Human Rights, Article 8.

112. *Cf. supra* note 110.

113. International Covenant on Civil and Political Rights, Article 2(3).

114. For example, in Borovsky v. Commissioner of Immigration, 90 Phil. Rpts. 107 (1951), the Philippine Supreme Court ordered an excludable alien released from indefinite detention on the ground that his detention violated customary international law, as reflected by the Universal Declaration, including specifically Article 8. Similarly, the Constitutional Court of Germany has declared that although "contemporary generally recognized principles of international law included only a few legal rules that directly create rights and duties of private individuals by virtue of the international law itself," they do create such rights and duties in "the sphere of the minimum standards for the protection of human rights." In the Matter of Republic of the Philippines, 46 BVerfGE 342, 362 (2BvM 1/76 December 13, 1977).

115. One famous example is The Paquete Habana, 175 U.S. 677, 700 (1900).

116. Individuals have frequently prevailed in claims that a foreign government's confiscation of a property or contractual right violated customary international law. In none of these cases did a court find that a private cause of action did not exist. *See* First Nat'l City Bank v. Banco Para El Comercio de Cuba, 462 U.S. 611 (1983); Dunhill v. Republic of Cuba, 425 U.S. 682 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981); Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1963), *aff'd* 383 F.2d 166 (2d Cir. 1967), *cert.*

national law by individuals in federal courts is well-accepted in United States jurisprudence.[117] Most recently in *Martinez-Baca v. Suarez-Mason*,[118] the court held that a United States citizen could invoke customary international human rights law in federal court directly under 28 U.S.C. § 1331 for acts of torture and prolonged arbitrary detention.[119]

The Justice Department altogether ignores these modern developments in international law. Instead, the Department argues that "the law of nations applies to matters within the jurisdiction of the United States only insofar as it is accepted into the law of the United States."[120] The Department further suggests that such "acceptance" must take the form of a specific "Act of Congress that 'defines' [the] substantive principle[] of international law to be part of United States law."[121] Thus, under this position, section 1350 actions would be limited to conduct that Congress has specifically defined elsewhere as an offense against the law of nations.

The narrowing construction of the Alien Tort Statute now urged by the Justice Department would dramatically limit the statute's effectiveness as a judicial remedy for violation of fundamental human rights, in derogation of the United States international obligation to provide such

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denied, 390 U.S. 956 (1968). The Executive has expressly urged that federal courts should adjudicate "a claim or counterclaim [that] alleged that an act of state violated customary international law." Letter of Legal Adviser Monroe Leigh, *reproduced in Dunhill*, 425 U.S. at 709. Similarly, Congress has authorized the adjudication of claims against foreign sovereigns in circumstances where "rights and property [were] taken in violation of international law." 28 U.S.C. § 1605(a)(3). If the Justice Department's view were adopted, none of these claims could be pressed unless the individuals could also point to a "private right of action" derived from some substantive criminal statute defining offenses against the law of nations.

117. Indeed, as the Supreme Court recognized in Davis v. Passman, 442 U.S. 228, 238 (1979), having a cause of action has traditionally meant nothing more than that a litigant has "recognized legal rights" whose invasion furnishes a basis for his claim to judicial relief. *See* D'Amato, *supra* note 46, at 95. As Professor Randall points out, "in cases involving the treatment of aliens, the confiscation of private property, and human rights, domestic courts have construed the law of nations to confer rights on private persons. Such rules . . . may be directly applied by domestic courts without implementing legislation." Randall, *supra* note 76, at 490. *Accord*, Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 234-235 (Collected Courses, vol. 178, Academy of International Law, 1982), Schneebaum, *supra* note 74. *See also* Note, *Enforcing the Customary International Law*, *supra* note 46, at 161-70 (concluding that, international human rights law recognizes substantive individual rights and contemplates individual enforcement of those rights).

118. Martinez-Baca v. Suarez-Mason, No. C-87-2057-SC, Slip Op. (N.D. Cal. Jan. 12, 1988).

119. *See also* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1543-44 (N.D. Cal. 1987).

120. J.D. Br. at 25.

121. *Id.* at 26.

remedies.[122] Moreover, the Department unjustifiably assumes that *only Congress* may "accept" a rule of customary international law as the law of the United States, and that a court may incorporate the law of nations into federal law only by "acting pursuant to legislative authorization."[123] Yet federal courts have historically issued common law rulings accepting a rule of customary international law as law of the United States even without legislative authorization.[124] In any event, even by the Justice Department's own standard, 28 U.S.C. section 1350 would constitute more than sufficient "legislative authorization" for a federal court to incorporate international human rights norms into the domestic law of tort remedies. While Congress may of course by statute limit the extent in which international law becomes domestically binding — for example, by imposing a territorial limit upon a statute criminalizing attacks upon diplomats — Congress has imposed no such limit in the Alien Tort Statute, where it has chosen to implement the United States' international obligations by authorizing the federal courts to hear "any" civil action brought by aliens for torts "committed in violation of the law of nations."

Customary law does not recognize a right of judicial enforcement for *all* violations of the law of nations, or even for all rights set forth in the Universal Declaration of Human Rights. Article 8 expressly limits the right to an effective remedy to "fundamental" rights. The United States, in its *Filartiga* memorandum, stressed this important limitation, reflected in the Supreme Court's decision in *Sabbatino*:[125]

> Indeed, it is likely that only a few rights have the degree of specificity and universality to permit private enforcement and that the protection of other asserted rights must be left to the political branches of government.[126]

But where, as here, individuals allege that they have suffered violations of fundamental customary international law norms, such as torture or degrading treatment or punishment, genocide, summary execution, arbitrary detention, or disappearance, international law contemplates

122. But *see*, THIRD RESTATEMENT, *supra* note 65, § 114 ("where fairly possible, a United States statute is to be construed so as not to conflict with international law . . .").

123. J.D. B. at 25.

124. *See, e.g.*, The Paquete Habana, 175 U.S. 677 (applying international law of prize without express legislative authorization); First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611 (1983)(applying principles of equity common to international law and federal common law to determine whether American courts should pierce the corporate veil of separate juridical entity established by foreign government to perform governmental functions).

125. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428, 430 n.34 (1964).

126. *See* Government *Filartiga* Memorandum, *supra* note 11, 19 I.L.M. at 604.

domestic judicial enforcement.[127]

When it enacted section 1350, Congress charged the federal courts with the responsibility to adjudicate such actions. In *The Paquete Habana*, the Supreme Court further directed that, "[i]nternational law is part of our law, and *must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.*"[128] This Court should not accept the Justice Department's invitation to create a conflict in the circuits by ignoring these unambiguous directives from both Congress and the Supreme Court.

CONCLUSION

For all the above reasons, amici respectfully suggest that this Court reverse the rulings of the courts below and hold, consistent with the Second Circuit in *Filartiga*, that the district courts have jurisdiction over these consolidated cases under 28 U.S.C. section 1350 and that plaintiffs have a right of action to seek redress for torts committed in violation of customary international law.[129]

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127. When such violations of fundamental human rights are alleged, international comity concerns would not bar adjudication of the suit. Under modern customary international law, it is widely accepted that fundamental international human rights are a matter of international concern and obligation, and that nations are obligated to abide by them even with respect to treatment of their own citizens within their borders. Filartiga v. Pena-Irala, 630 F.2d 876, 884-885 (2d Cir. 1980). As the State Department noted in 1972:

> Reflective of the recent growth of international human rights law is general agreement within the international legal community that transgression of human rights are not matters within a state's exclusive domestic jurisdiction and accordingly, that the principle of nonintervention in internal affairs does not bar one state from taking action designed to promote respect for human rights in another.

UNITED STATES DEPARTMENT OF STATE, MEMORANDUM OF LAW: UNITED STATES GOVERNMENTAL OBLIGATIONS REGARDING HUMAN RIGHTS OF INDIVIDUALS OUTSIDE THE UNITED STATES (Aug. 23, 1972), *reprinted in International Protection of Human Rights: The Work of International Organizations and the Role of U.S. Foreign Policy, Hearing before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93rd Cong., 1st Sess. 68 (1973).

128. The Paquete Habana, 175 U.S. 677, 700 (1900)(emphasis added).

129. Submitted by: David Cole, Jules Lobel, & Harold Hongju Koh.

APPENDIX

UNITED STATES: MEMORANDUM FOR THE UNITED STATES SUBMITTED TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN *FILARTIGA v. PENA-IRALA* IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-6090

DOLLY M.E. FILARTIGA AND DR. JOEL FILARTIGA,
Plaintiffs-Appellants

v.

AMERICO NORBERTO PENA-IRALA,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

The United States files this memorandum in response to the Court's request that "the Department of State submit a memorandum setting forth its position concering the proper interpretation of 28 U.S.C. § 1350 in light of the facts of this case."[130] The memorandum addresses the following questions:

1. Whether the torture of a foreign citizen by an official of the

130. Letter from A. Daniel Fusaro, Clerk, to Roberts B. Owen, October 29, 1979. Under 28 U.S.C. § 516, the conduct of litigation in which the United States or an agency is interested is reserved to the Department of Justice. For that reason, the Department of Justice is filing this memorandum, developed jointly by the Department of Justice and the Department of State.

same country is a violation of the law of nations within the meaning of 28 U.S.C. § 1350?

2. If so, whether such a violation gives rise to a judicially enforceable remedy and is therefore a tort within the meaning of that provision?

STATEMENT

This appeal involves the interpretation of 28 U.S.C. § 1350, which gives the district courts jurisdiction in all cases where an alien sues for "a tort only, committed in violation of the law of nations or a treaty of the United States." The complaint alleges that defendant, acting under color of his authority as a Paraguayan official, tortured and killed Joel Filartiga, a Paraguayan national, and that his conduct was a tort in violation of the law of nations. The district court nonetheless held that it lacked jurisdiction. The court acknowledged the strength of plaintiff's argument that torture violates international law, but concluded that dismissal was compelled by two prior decisions of this Court, *ITT v. Vencap, Ltd.*,[131] and *Dreyfus v. Von Finck*,[132] which it read to establish that:

> conduct, though tortious, is not in violation of 'the Law of Nations', as those words are used in 28 U.S.C. § 1350, unless the conduct is in violation of those standards, rules or customs affecting the relationship between states and between an individual and a foreign state, and used by those states for their common good and/or in dealings *inter se*.[133]

Because the court dismissed the complaint for lack of jurisdiction, it did not reach defendant's alternative argument for dismissal based on *forum non conveniens*. Plaintiffs appealed to this Court.

ARGUMENT

I. OFFICIAL TORTURE VIOLATES THE LAW OF NATIONS.

The district court dismissed the complaint because it believed that the torture of a foreign citizen by an official of the same country does not violate the law of nations as that term is used in 28 U.S.C. § 1350. If section 1350 reached only those practices that historically have been viewed as violations of international law, the court's decision would very likely be correct. Before the turn of the century and even after, it was

131. ITT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).

132. Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976).

133. The quote of the district court is from the joint appendix to the United States' *Filartiga* memorandum. The joint appendix is not reprinted here.

generally thought that a nation's treatment of its own citizens was beyond the purview of international law. But as we demonstrate below, section 1350 encompasses international law as it has evolved over time. And whatever may have been true before the turn of the century, today a nation has an obligation under international law to respect the right of its citizens to be free of official torture.

A. Section 1350 Encompasses the Law of Nations as that Body of Law May Evolve.

Section 1350 originated as Section 9 of the Judiciary Act of 1789[134] and has not changed significantly since that time. It provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This is one of several provisions in the Judiciary Act "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions."[135]

The law of nations in section 1350 refers to the law of nations as that body of law may evolve. There is no reason to believe that Congress intended to freeze the meaning of the law of nations in this statute as of 1789, any more than it intended the simultaneous grant of jurisdiction over maritime actions to be limited to maritime law as it then existed.[136] Since the law of nations had developed in large measure by reference to evolving customary practice, the framers of the first Judiciary Act surely anticipated that international law would not be static after 1789.

The Paquete Habana[137] illustrates this evolutionary process. There, the question was whether international law protected fishing ships from capture during times of war. Although a 1798 British case had held that the protection of such ships was a rule of comity only, the Court held that "the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law."[138]

If the application of section 1350 were limited to the subjects en-

134. 1 STAT. 76 (1789).

135. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964).

136. Maritime law has evolved significantly since 1789. *See* Moragne v. State Marine Lines, 398 U.S. 375 (1970) (overruling an 1886 decision and holding that maritime law affords a remedy for wrongful death on navigable waters).

137. The Paquete Habana, 175 U.S. 677 (1900).

138. *Id.* at 694.

compassed by the law of nations in 1789, leaving only the state courts competent to administer any rules of international law that might subsequently develop, the result would be to frustrate the statute's central concern for uniformity in this country's dealings with foreign nations. Accordingly, the district court's jurisdiction in this case turns not on whether the conduct alleged in the complaint would have been a violation of the law of nations in 1789, but on whether it is customarily treated as a violation of the law of nations today.

B. International Law Now Embraces the Obligation of a State to Respect the Fundamental Human Rights of Its Citizens.

The view that a state's treatment of its own citizens is beyond the purview of international law was once widely held and is reflected in traditional works on the subject.[139] However, as we have stated, customary international law evolves with the changing customs and standards of behavior in the international community. Early in this century, as a consequence of those changing customs, an international law of human rights began to develop. This evolutionary process has produced wide recognition that certain fundamental human rights are now guaranteed to individuals as a matter of customary international law.

As we demonstrate in Part II, *infra*, this does not mean that all such rights may be judicially enforced. Indeed, it is likely that only a few rights have the degree of specificity and universality to permit private enforcement and that the protection of other asserted rights must be left to the political branches of government. But this distinction between judicially enforceable rights and rights enforceable only by the political branches should not obscure the central point we make here. The district court's assumption that a nation has no obligation under international law to respect the human rights of its citizens is fundamentally incorrect.

The sources of international law are international agreements, international custom, general principals of law recognized by civilized nations, and judicial decisions and the teachings of learned commentators.[140] Developments in each of these areas have had a role in establishing the twentieth century international law of human rights.

The first significant treaty development was the Covenant of the

139. *E.g.*, L. Oppenheim, INTERNATIONAL LAW: A TREATISE, Vol. 1, 362-369 (2d Ed. 1912).

140. Statute of the International Court of Justice, Article 38, June 26, 1945, 59 Stat. 1055, 1060 (effective October 24, 1945). *See also*, The Paquete Habana, 175 U.S. at 700.

League of Nations in 1919, which declared that the members of the League would attempt to secure and maintain fair and humane conditions of labor, and secure just treatment for the inhabitants of territory under their control.[141] Other early developments were the treaties entered into after World War I guaranteeing the religious, cultural, and political rights of national minorities.[142]

Treaty activity accelerated after World War II. In 1945, the United Nations Charter imposed on U.N. members a general obligation to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[143] The U.N. Charter represents a clear break with the traditional view that a nation's treatment of its citizens is beyond the concern of international law—a break also evidenced by recognition in the Charter of the Organization of American States of "the fundamental rights of the individual without distinction as to race, nationality, creed, or sex."[144]

More recently, the obligation of states to respect fundamental human rights has been reiterated in a growing number of more specific multilateral treaties. These include The International Covenant on Civil and Political Rights,[145] The American Convention on Human Rights[146] and the European Convention for the Protection of Human Rights and

141. The Covenant of the League of Nations, Articles 22, 23, June 28, 1919, *reprinted in Treaties and Other International Agreements of the United States of America 1776-1949*, 2 BEVANS 48, 55-57 (1969).

142. *See e.g.*, Treaty Between the Principal Allied and Associated Powers and Poland, signed at Versailles, June 28, 1919, *reprinted in Treaties, Conventions, International Acts, Protocol and Agreements Between the United States of America and Other Powers 1910-1923*, 3 MALLOY-REDMOND 3714 (1923). In addition, the general treaties of peace concluding the war included provisions aimed at guaranteeing minority rights. *See, e.g.*, Treaty of Peace with Austria, Part 3, Sec. 5, signed at St. Germaine-en-Laye, September 10, 1919, *reprinted in* 3 MALLOY-REDMOND 3149.

143. UNITED NATIONS CHARTER, arts. 55, 56, 59 (June 26, 1945), Stat. 1031, 1045-1046, 3 BEVANS 1153, 1166-1167 (1969).

144. CHARTER OF THE ORGANIZATION OF AMERICAN STATES, arts. 3(j), 16, 43(a) (entered into force December 13, 1951), as amended by the Protocol of Buenos Aires of 1967 (entered into force February 27, 1970), OAS Treaty Series No. 1-C, OAS, OR, OEA/Ser.A/2 (English), Rev. (1970), 21 U.S.T. 607, T.I.A.S. 6847. See also American Declaration of the Rights and Duties of Man, ch. 1 (1948), OAS, OR, OEA/Ser. L/V/E.23, Doc. 21, Rev. 2.

145. General Assembly Resolution 2200 (XXI)A (December 16, 1966), *entered into force* March 23, 1976; *Four Treaties Pertaining to Human Rights*, Message from the President of the United States, S. DOC. NO. EXEC. C, D, E, and F, 95th Cong., 2d Sess. (1978).

146. *Signed*, San Jose, Costa Rica, November 22, 1969, *entered into force* July 18, 1978, OAS Treaty Series No. 36, OAS, OR, OEA/Ser.A/16 (English).

Fundamental Freedoms.[147]

International custom also indicates that nations have accepted as law an obligation to observe fundamental human rights. In 1948, The United Nations General Assembly unanimously adopted the Universal Declaration of Human Rights,[148] which goes beyond the U.N. Charter in specifying and defining the fundamental rights to which all individuals are entitled. The Universal Declaration has been followed by a growing number of U.N. resolutions clarifying and elaborating on these rights or invoking them in specific cases.[149] In a parallel development, the International Conference on Security and Cooperation in Europe, which met in Helsinki and Geneva between 1973 and 1975, adopted a Final Act declaring that the participating nations would respect the human rights of their nationals.[150] The Final Act, like the U.N. resolutions, does not have the legal effect of a treaty but provides evidence of customary international law.[151]

General principles of law recognized by civilized nations also establish that there are certain fundamental human rights to which all individuals are entitled, regardless of nationality. Although specific practices differ widely among nations, all nations with organized legal systems recognize constraints on the power of the state to invade their citizens' human rights. In the period 1948-1973, the constitutions or other important laws of over 75 states either expressly referred to or clearly borrowed from the Universal Declaration of Human Rights.[152] In the same period, the Declaration was referred to in at least 16 cases in domestic courts of various nations.[153]

The decisions of the International Court of Justice also reflect and confirm the existence of a customary international law of human

147. *Signed* November 4, 1950, *entered into force* September 3, 1953, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 221.

148. General Assembly Resolution 217 (III)A (December 10, 1948).

149. *See* United Nations Action in the Field of Human Rights (1974), ST/HR/2 (Pub. Sales No. E.74.XIV.2), at 14-15.

150. Conference on Security and Cooperation in Europe: Final Act (Helsinki, 1975), 73 DEP'T STATE BULL. 323, 325 (1975).

151. As further evidence, see Declaration on Principles of International Law concerning Friendly Relations and Cooperation amond States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV) (October 24, 1970). The Declaration proclaims that: "Every State has the duty to promote through joint and seperate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter." It further states: "The principles of the Charter which are embodied in this Declaration constitute basic principles of international law. . . ."

152. UNITED NATIONS ACTION, *supra* note 149, at 17-18.

153. *Id.* at 19.

rights.[154] And the affidavits of four American experts in international law, filed by plaintiffs below, document the broad recognition among legal scholars that human rights obligations are now part of customary international law.[155]

In sum, as the Department of State said in a recent report to Congress on human rights practices: "There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens. . . . There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity."[156]

We recognize that a panel of this Court has said that "violations of international law do not occur when the aggrieved parties are nationals of the acting state." As we have shown, however, this statement is incorrect and should not be followed.[157]

C. Freedom from Torture Is among the Fundamental Human Rights Protected by International Law.

Every multilateral treaty dealing generally with civil and political human rights proscribes torture. These include The American Convention on Human Rights,[158] The International Covenant on Civil and

154. Nuclear Tests (Australia v. France), Judgment of December 20, 1974, 1974 I.C.J. 253, 303 (Opinion of Judge Petren); Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16.

155. See Affidavit of Richard B. Lillich (A. 65-70); Affidavit of Thomas M. Franck (A. 63-64); Affidavit of Myres S. MacDougal (A. 71); Affidavit of Richard Anderson Falk (A. 61-62).

156. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979, published as Joint Committee Print, House Comm. on Foreign Affairs & Senate Comm. on Foreign Relations, 96th Cong., 2d Sess. (February 4, 1980) Introduction at 1.

157. Dreyfus v. Von Frink, 534 F. 2d 24, 31 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976) mistakenly relied on Mr. Justice White's dissent in *Sabbatino* for its conclusion. At one point in his opinion Mr. Justice White does distinguish several cases decided long before the turn of the century as cases where violations of international law were not present because the parties were nationals of the acting state. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 442 n.2 (1964). However, Mr. Justice White makes clear elsewhere in his opinion that this is not the law today. In discussing a case in which an individual brought suit to recover property expropriated by the Nazis, Mr. Justice White specifically explained that "racial and religious expropriations, while involving nationals of the foreign state and therefore customarily not cognizable under international law, had been condemned in multinational agreements and declarations as crimes against humanity." *Id.* at 457 n.18. Accordingly, Mr. Justice White concluded, "the acts could. . .be measured in local courts against widely held principle rather than judged by the parochial views of the forum." *Id.* Mr. Justice White's opinion thus reinforces our view that international law prohibits a nation from violating the fundamental human rights of its citizens.

158. Article 5 provides in relevant part, that "No one shall be subjected to torture or to

Political Rights[159] and The European Convention for the Protection of Human Rights and Fundamental Freedoms.[160] In addition, the Geneva Conventions of 1949 forbid torture in international or domestic conflicts and declare it to be a "grave breach" of the conventions.[161] This uniform treaty condemnation of torture provides a strong indication that the proscription of torture has entered into customary international law.[162]

We do not suggest that every provision of these treaties states a binding rule of customary international law. Where reservations have been attached by a significant number of nations to specific provisions or where disagreement with provisions is cited as the ground for a nation's refusal to become a party, the near-unanimity required for the adoption of a rule into customary international law may be lacking.[163] No such disagreement has been expressed about the provisions forbidding torture.

A court also must distinguish between provisions that reflect principles that are considered desirable but incapable of immediate realization and those provisions that codify fundamental human rights. Illustrative of the former category are the declarations in the International Covenant on Economic, Social and Cultural Rights that individuals are entitled to

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cruel, inhuman, or degrading punishment or treatment." OAS Treaty Series No. 36, *supra* note 146, at 2.

159. Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." General Assembly Resolution 2200 (XXI)A, *supra* note 145.

160. Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 221.

161. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, Articles 3, 13, 129, 130.

162. These treaty provisions, in conjunction with other evidence, are persuasive of the existence of an international norm that is binding as a matter of customary law on all nations, not merely those that are parties to the treaties. A. D'Amato, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 103, 124-128 (1971).

The United States has signed both the American Convention on Human Rights and the International Covenant on Civil and Political Rights, and those instruments await the advice and consent of the Senate. See *Four Treaties Pertaining to Human Rights*, *supra* note 145. Only European countries are entitled to be parties to the third treaty.

163. For instance, Article 20 of the International Covenant on Civil and Political Rights prohibits "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence. . . ." *Four Treaties Pertaining to Human Rights*, *supra* note 145, at 29. This provision conflicts with principles of free speech that are central to the political values of many democracies. A number of nations, including the United Kingdom, Sweden, Denmark, Norway, and Finland, expressed reservations to Article 20 upon ratifying the Covenant. *Multilateral Treaties in Respect of Which the Secretary General Performs Depositary Functions*, UN Doc. ST/LEG/Ser. D/12 108, 112, 114 (1978). President Carter has proposed a similar reservation in connection with United States ratification. *Four Treaties Pertaining to Human Rights*, *supra* note 145, at XI-XII.

favorable working conditions and to social security.[164] In proposing that the Senate ratify that treaty, the President observed:

> Some of the standards established under these articles may not readily be translated into legally enforceable rights, while others are in accord with United States policy, but have not yet been fully achieved. It is accordingly important to make clear that these provisions are understood to be goals whose realization will be sought rather than obligations requiring immediate implementation.[165]

The President further recommended that the Senate express its understanding that these and like provisions "described goals to be achieved progressively rather than through immediate implementation."[166] The Covenant itself casts these principles in this light.[167] In contrast, because torture is universally condemned and incompatible with accepted concepts of human behavior, the protection against torture must be considered a fundamental human right.

International custom also evidences a universal condemnation of torture. While some nations still practice torture, it appears that no state asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and make no attempt to justify its use.[168] That conduct evidences an awareness that torture is universally condemned. This universal condemnation is made explicit in The Universal Declaration of Human Rights, which declares that "No one shall be subjected to torture. . . ."[169] That principle has been reiterated in a number of unanimous U.N. resolutions, including the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("U.N. Declaration on Torture").[170]

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164. International Covenant on Economic, Social, and Cultural Rights, Articles 7, 9. *Four Treaties Pertaining to Human Rights, supra* note 145, at 15-16.

165. *Four Treaties Pertaining to Human Rights, supra* note 145, at X.

166. *Id.* at IX.

167. International Covenant on Economic, Social, and Cultural Rights, Article 2(1), *Four Treaties Pertaining to Human Rights, supra* note 145, at 14.

168. *See, e.g.*, Affidavit of Richard Anderson Falk (A. 62); Affidavit of Thomas M. Franck (A.64). In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of such torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture. The Department's COUNTRY REPORTS ON HUMAN RIGHTS, *supra* note 156, reports no assertion by any nation that torture is justified.

169. General Assembly Resolution 217(III)A (December 10, 1948), Art. 5.

170. General Assembly Resolution 3452(XXX) (December 9, 1975). Article 2 of the Declaration provides:

The U.N. Declaration on Torture not only confirms that international custom outlaws torture, but also supplies a precise definition of the conduct proscribed. The U.N. Declaration on Torture defines torture as—

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.[171]

This definition provides guidance to any court that may be required to determine whether particular conduct violates the proscription of torture in customary international law.

Analysis of general principles of law also discloses consistent condemnation of torture in national constitutions and legislation. Torture is specifically forbidden in the constitutions of over 40 nations.[172] The constitutions of over 15 additional nations contain implicit prohibitions against torture.[173] Eighteen states have incorportated the Universal Dec-

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> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 3 provides:

> No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

171. General Assembly Resolution 3452(XXX) (December 9, 1975), Annex, Art. 1 (1). The United Nations Human Rights Commission is now drafting a Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That draft Convention would require each party to make torture criminally punishable within its jurisdiction. It contains a very similar definition of torture (E/CN.4/1367, Annex at 1):

> For the purpose of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

172. Revue Internationale de Droit Penal Nos. 3 and 4, at 208 (1977).

173. *Id.* at 208-209.

laration of Human Rights in their constitutions and therefore have accepted the prohibition against torture contained in Article 5 of the Declaration.[174]

Condemnation of torture is reflected in both constitutional and statutory law in the United States. Conduct falling within the definition of torture in the U.N. Declaration on Torture would be a criminal offense under 18 U.S.C. § 242 and civilly actionable under 42 U.S.C. § 1983 or under the United States Constitution. Moreover, with certain exceptions, federal statutes bar assistance "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights", specifically including "torture."[175] These statutes evidence the United States' acceptance of the international norm condemning torture and reflect the fact that the norm is certain enough to be cognizable in federal courts.

Finally, judicial decisions and the commentary of experts confirm that official torture violates international law. As shown in Part IB, these authorities recognize the modern emergence of human rights norms in customary international law. Plaintiffs have submitted the affidavits of four American scholars confirming that the proscription of torture is such a norm.[176] And published commentary is to the same effect.[177] In these circumstances, the conclusion that international law prohibits torture is inescapable.

II. OFFICIAL TORTURE IS A TORT AND GIVES RISE TO A JUDICIALLY ENFORCEABLE REMEDY.

Not every violation of international law is a tort within the meaning of section 1350. However, some such violations are judicially cognizable as torts. A corollary to the traditional view that the law of nations dealt primarily with the relationship among nations rather than individuals was the doctrine that generally only states, not individuals, could seek to enforce rules of international law.[178] Just as the traditional view no longer reflects the state of customary international law, neither does the latter doctrine.

Indeed, it has long been established that in certain situations, indi-

174. *Id.* at 211.

175. 22 U.S.C. § 2304(a)(2), (d); 22 U.S.C. § 2151.

176. Affidavit of Richard Anderson Falk (A. 61-62); Affidavit of Thomas M. Franck (A. 63-64); Affidavit of Richard B. Lillich (A. 65-70); Affidavit of Myres S. MacDougal (A. 71).

177. O'Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom*, 71 AM J. INT'L L. 674, 687-688 (1977).

178. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422-423 (1964).

viduals may sue to enforce their rights under international law. For example, when a ship is seized on the high seas in violation of international law, the owner of the ship may sue to recover the ship as well as seek damages.[179] Similarly, when there has been an assault on a foreign ambassador in violation of international law, domestic courts may properly furnish a remedy.[180]

The more recently evolved international law of human rights similarly endows individuals with the right to invoke international law, in a competent forum and under appropriate circumstances. The highly respected Constitutional Court of Germany has recognized this right of individuals. The court declared that, although "contemporary generally recognized principles of international law include only a few legal rules that directly create rights and duties of private individuals by virtue of international law itself," an area in which they do create such rights and duties is "the sphere of the minimum standard for the protection of human rights."[181]

As a result, in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts. As the Supreme Court said in *The Paquete Habana*: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.[182]

Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance.[183] Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.[184]

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179. The Paquete Habana, 175 U.S. 677 (1900).

180. *Cf.* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).

181. In Matter of the Republic of the Philippines, 46 BVerfGE 342, 362 (2 BvM 1/76, December 13, 1977) (translated from the German by Stefan A. Riesenfeld); see also Borovsky v. Commissioner of Immigration, Judgment of September 28, 1951 (S.Ct. Philippines), *summarized in* [1951] UNITED NATIONS YEARBOOK ON HUMAN RIGHTS 287-288; Chirskoff v. Commissioner of Immigration, Judgment of October 26, 1951 (S.Ct. Philippines), *summarized in id.* at 288-289; Judgment of Court of First Instance of Courtrai (Belgium) of June 10, 1954, *summarized in* [1954] UNITED NATIONS YEARBOOK ON HUMAN RIGHTS 21 (courts relied on Universal Declaration of Human Rights in ordering release from detention).

182. The Paquete Habana, 175 U.S. 677,700 (1900).

183. Baker v. Carr, 369 U.S. 186, 211 (1962).

184. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 430 n. 34 (1964).

This does not mean that section 1350 appoints the United States courts as Commissions to evaluate the human rights performance of foreign nations.[185] The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law. Accordingly, before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection.[186] When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights. As we have shown in Part IC, official torture is both clearly defined and universally condemned. Therefore, private enforcement is entirely appropriate.[187]

From what we have said, it should be clear that a court is not at liberty to enforce its own views of policy under the guise of interpreting the requirements of international law. On the other hand, as the Supreme Court stated in *Sabbatino*:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[188]

In this case, not only is there a consensus in the international community that official torture is unlawful, but Paraguay's Constitution ex-

185. *Cf. id.* at 423.

186. *Id.* at 428, 430 n.34.

187. There are few decisions which base judgments against torturers directly on customary international law. But this attests to the longstanding condemnation of torture under municipal law and the more recent evolution of international human rights law. Courts have, nonetheless, invoked customary international law along with municipal and treaty law in cases involving torture. Ireland v. United Kingdom, Judgment of January 18, 1978 (European Ct. of Human Rights) summarized in [1978] Y.B. EUR. CONV. ON HUMAN RIGHTS 602 (Council of Europe) (UN Declaration of Torture relied on in interpreting the European Convention on Human Rights); Auditeur Militaire v. Krumkamp, Pasicrisie Belge, 1950.3.37 (February 8, 1950) (Belgian Conseil de guerre de Brabant), summarized in 46 AM.J. INT'L L. 162-163 (1952) (Article 5 of Universal Declaration of Human Rights, which prohibits torture and cruel treatment, cited as authority that under customary international law the defendant accused of war crimes was not free to use torture).

188. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

pressly prohibits official torture[189] and Paraguayan law recognizes a tort action as an appropriate remedy.[190] The compatibility of international law and Paraguayan law significantly reduces the likelihood that court enforcement would cause undesirable international consequences and is therefore an additional reason to permit private enforcement.

Because international law and Paraguayan law both prohibit torture, this Court need not decide whether considerations of comity or a proper construction of section 1350 might require a different result if, despite the nearly universal condemnation implicit in the existence of a rule of customary international law, the jurisdiction with the most immediate interest in the controversy did not prohibit torture. Similarly, this case does not present any questions concerning whether international law, Paraguayan law or federal common law will govern other aspects of this lawsuit. The only question presented is whether official torture is a "tort . . . committed in violation of the law of nations. . . ."[191] Because the district court erred in concluding that it is not, its judgment should be reversed and the case remanded for further proceedings.[192]

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.[193]

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189. Paraguayan Constitution art. 45.

190. Joint Appendix to this Memorandum, at 51-53, 80.

191. Because the lower court dismissed for lack of jurisdiction, it did not decide whether the case should be dismissed on the ground of *forum non conveniens*. Although we agree with plaintiffs that this question should be addressed by the district court first, we note that when the parties and the conduct alleged in the complaint have as little contact with the United States as they have here, abstention in generally appropriate. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); Lauritzen v. Larsen, 345 U.S. 571 (1953). Plaintiffs assert that abstention is inappropriate because a tort suit in Paraguay would be a sham. For reasons of comity among nations, however, such an assertion should not be accepted absent a very clear and persuasive showing. In determining whether abstention is appropriate, the court should also consider the fact that the defendant has been deported. *Compare* United States v. Castillo, 615 F.2d 878, 882 (9th Cir. 1980).

192. Defendant erroneously suggests (Br. 4-16) that Section 1350 is unconstitutional in conferring jurisdiction on federal courts to entertain tort actions under the law of nations. Customary international law is federal law, to be enunciated authoritatively by the federal courts. *Sabbatino*, 376 U.S. at 425; see The Paquete Habana, 175 U.S. 677, 700 (1900). An action for tort under international law is therefore a case "arising under . . . the laws of the United States" within Article III of the Constitution. See Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325, 331-336 (1964).

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